Supreme Court, U.S.
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No. _____

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS AND AUTOMOTIVE EMPLOYEES OF CONTRA COSTA COUNTY, LOCAL NO. 315,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the permissible area of lawful picketing and oral and written appeals to persuade employees of a neutral employer not to perform work necessary to the normal operations of a struck employer at a common work situs, as recognized by this Court in *Local 761 v. NLRB*, 366 U.S. 667 (1961), is inapplicable, with the result that the picketing and appeals constitute an unlawful secondary boycott, if the common work situs is owned or controlled by the neutral employer.

2. Alternatively, whether the principle which validates the picketing of gates at a common work situs where suppliers of a struck employer enter, is equally applicable to the picketing of gates where neutral employees enter the work situs to interrelate with and perform services for the struck employer required for the latter's normal operations.

ADDITIONAL PARTY

(Supreme Court Rule 14.1(b))

In addition to the parties named in the caption of the case, Atchison, Topeka & Santa Fe Railway Company appeared as an Intervenor in the United States Court of Appeals for the Ninth Circuit, and as charging party in the proceeding before the National Labor Relations Board.

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Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

General Truck Drivers, Warehousemen, Helpers and Automotive Employees of Contra Costa County, Local No. 315, hereafter referred to as the Union, petitions for the issuance of a writ of certiorari to review

the decision and judgment of the United States Court of Appeals for the Ninth Circuit in this proceeding, No. 92-70417 on the docket of the Appellate Court.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 20 F.3d 1017 (9th Cir. 1994), and is reproduced in Appendix A, *infra*. The Decision and Order of the National Labor Relations Board, including the Decision of its Administrative Law Judge, is reported at 306 NLRB 616 (1992), and is reproduced in Appendix B, *infra*.

JURISDICTION

The decision of the Court of Appeals was filed on April 1, 1994. Jurisdiction of this Court is based on 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS

The relevant statutory provision is Section 8(b)(4)(B) of the National Labor Relations Act (29 U.S.C. Section 158(b)(4)(B), and is reproduced in Appendix C, *infra*.

STATEMENT OF THE CASE

This case grows out of a labor dispute

between the Union and Piggyback Services, Inc., an independent contractor for Atchison, Topeka and Santa Fe Railroad Co. (Santa Fe) engaged in loading and un ading containers on and off railcars at Santa Fe's rail yard in Richmond, California. Picketing began on July 2, 1990 and ended on August 29, 1990 when Piggyback and the Union settled their dispute. As a result of unfair labor practice charges filed by Santa Fe, the National Labor Relations Board (Board) found that the activities of the Union during the dispute, including picketing and oral and written appeals for support, violated the secondary boycott provisions of the National Labor Relations Act (29 U.S.C. Section 158(b)(4)(B)), hereafter referred to as the Act. The Appellate Court has enforced the Board's order.

The underlying facts may be summarized as follows:

A. Description of Santa Fe's Rail Terminal

The Richmond rail yard involved in this case includes several square miles of miscel-

laneous structures and trackage accommodating some 60 freight trains entering and exiting daily. Approximately 205 employees of Santa Fe, including engineers, switching crews, mechanical employees, track maintenance employees and clericals, represented by seven different railroad craft unions, work in the terminal area. About 40 percent of the freight is "intermodal", i.e., containers or vans containing freight transported by rail flatcars and transferred for local pickup and delivery to or from motor trucks hauling the vans on trailing equipment.

All of the Richmond terminal's incoming and outgoing rail traffic uses a single "main line" track at the east end of the terminal which crosses a road a few hundred yards from the terminal, known as Indian Crossing. Approaching the rail yard from the Indian Crossing, the main track branches into multiple tracks within the yard. Four of these tracks lead to an area on the north side of the yard known as the intermodal or ramp area where vans are loaded onto and off of rail-

road flatcars by Piggyback.

At the west end of the rail yard, crossed by a freeway overpass, there are two spur tracks relevant to the events in this case. One is called the West Switching Lead, which proceeds in a fairly straight line through a tunnel and into an area known as Point Richmond. The other spur curves to the south, and proceeds to an industrial area at the Port of Richmond, about 2 miles from the rail yard; it is designated as the Zone 3 Industries spur. The principal use of these spurs is switching.

Some of the trains entering and leaving the yard are used exclusively to transport intermodal freight; other trains comprise a mixture of flatcars carrying intermodal freight and cars carrying non-intermodal freight. Switching operations are carried on within the terminal area to locate the flatcars used in intermodal work in the area where Piggyback functions.

Entrances from the street to the terminal area are principally along South Garrard

Boulevard, which borders the rail yard on the south. These entrances are referred to in the record, and by the Board and Appellate Court as Gates No. 1 through No. 5. Gate No. 1 is furthest west, and was posted during the events in this case for use by Piggyback personnel and its visitors and suppliers, but was not used prior to the dispute during the normal course of business. Proceeding easterly, Gate No. 2 is an entrance to an office building occupied jointly by Santa Fe and Piggyback. There is an adjacent parking lot, but this entrance does not provide access to the rail yard. Further east on South Garrard Boulevard is Gate No. 3, which is the entrance for trucks hauling vans used in intermodal traffic into and out of the yard. Some 600 vans are transported daily in and out of this entrance. Several hundred yards further east is a building where Santa Fe maintains additional offices. There are two entrances to the rail yard in this area, referred to in the record as Gates No. 4 and No. 4(b), and are used principally by Santa

Fe's employees, including train crews, maintenance of way crews and other craft employees. Finally, the road which intersects with the main railroad line at Indian Crossing beyond the yard area, even further to the east, is referred to as Gate No. 5. This crossing leads to an access road into the terminal yard, and is used by Santa Fe's employees as well as by suppliers of Piggyback.

B. The Work Performed by Piggyback's Employees

The primary function of Piggyback's employees is to operate the heavy equipment used to place vans on and take vans off rail flatcars handling intermodal traffic. There are also a number of related work operations. Thus, Piggyback employees check trucks in and out of the yard at a check point just inside Gate No. 3, inspect and weigh the vans, obtain the signature of the truck driver on a form generated by a Santa Fe computer to indicate the condition of the van, and input that information into the main computer frame

of Santa Fe. The same Piggyback employee may direct the truck driver to the location in the staging area where his van is to be parked, or another van is to be picked up. Piggyback employees move vans from staging areas to the flatcars for loading, and from the flatcar to the staging area for subsequent pickup by an outside truck driver.

Piggyback's and Santa Fe's employees work with one another in connection with switching of railroad cars. Similarly, Piggyback's yard supervisors coordinate car movements with Santa Fe's assistant train masters to create a "split" in a train — to open a gap between two cars by uncoupling them — in order to permit Piggyback's hostlers to have access between the staging area where the vans are kept and the tracks where the flatcars are located, without having to drive around a long freight train. In short, all movement of flatcars in and out of the area where Piggyback works calls for Santa Fe and Piggyback to work together.

The person in charge of Piggyback's day-

to-day operations at the Richmond terminal is its terminal manager. The terminal manager, along with several employees of Piggyback classified as coordinators, and one or two clericals employed by Piggyback, occupy an office in the building adjacent to Gate 2, which also contains the offices of Santa Fe's Director of Intermodal Services and Santa Fe's clerical employees. Piggyback's terminal manager spends approximately 60 percent of his time in his office regularly conferring and communicating with various Santa Fe employees, including the assistant train masters and others, in order to facilitate the intermodal operation and to resolve problems which his subordinates encounter in the performance of their job duties.

Piggyback's coordinators are in continuous communication with Santa Fe's assistant train masters. The coordinators, who are on duty 24 hours per day, are responsible for making sure the right railroad flatcars and vans are on the right railroad tracks at the right time, so they may be handled by

Piggyback's ramping and deramping employees as scheduled. In order to perform their duties the coordinators communicate constantly with Santa Fe's assistant train masters and with other Santa Fe personnel in order to get the track assignments for trains, information about the spotting of flatcars, and other information indispensable for Piggyback to perform its ramping and deramping work at the terminal.

C. The Union's Picketing and Handbilling Activity

At the outset of the dispute the Union confined its picketing to Gate No. 1, which had been posted for the use of Piggyback personnel, visitors, customers and suppliers. The picket sign named as the primary employer Piggyback, and protested an unfair lockout. Ten days later, on July 12, 1990, the Union extended its picketing to Gate No. 3, used by truck drivers bringing vans in and out of the terminal area. The pickets passed out a handbill to the drivers asking them to "respect our picket line against Piggy Back

Services Inc.", and adding:

> "If you are here to pick up or drop a trailer, you will be dealing directly with employees of Piggy Back Services, Inc. We are asking you not to do that."

About the same time the Union wrote to United Parcel Service, Santa Fe's largest customer for intermodal freight, and explained that Union pickets would be asking its drivers entering the Santa Fe yard "who do business directly with Piggy Back Services, Inc., to refuse to perform any work directly related to the Piggy Back Services, Inc., operation."

On July 30, 1990 the Union requested Santa Fe, by letter, to give its pickets permission to enter the yard and patrol at the point where the main track connects with spurs leading to the Piggyback ramp area. Failing to receive the requested permission, the Union on August 10 posted pickets at the Indian Crossing, where trains approached the terminal, some of them on their way to the intermodal ramp area. Handbills were dis-

tributed out to Santa Fe personnel at this location, asking that railcars not be delivered to Piggyback employees, but stating that the Union was not "asking you to cease any work unrelated to Piggy Back's day-to-day operations." Also on August 10, pickets stationed at Gate No. 1 were authorized by the Union to picket trains hauling intermodal freight cars in the areas of West Switching Lead and Zone 3 Industries spur tracks while involved in switching cars for use in the intermodal area.

Finally, on August 24 the Union extended its picketing and handbilling to Gates Nos. 2 and 4. Leaflets handed out to Santa Fe employees requested that they "refuse to deliver railcars to Piggy Back employees to work on, refuse to work with Piggy Back employees, and refuse to perform switching services to enable Piggy Back employees to do their work". The leaflet added that the Union was "not asking you to cease any work unrelated to Piggy Back's day-to-day opera-

tions.[1]

All Union activity stopped on August 29 when the Union and Piggyback settled their dispute.

D. The Board's Decision and Order

Adopting the findings and conclusions of the Administrative Law Judge, the Board found that the Union had violated Section 8(b)(4)(B) of the Act. Although the Board did not quarrel with the Union's contention that it had confined its appeals to neutral employees to cease performing work at Santa

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[1]In addition to the picketing and related activity described in the text, there was brief picketing at a location removed from the Santa Fe terminal where truck drivers dropped off their equipment to avoid the picket line at Gate No. 3, and supervisors then drove the same equipment through Gate No. 3 for delivery to Piggyback. The picket at this location distributed handbills to the drivers with the same message as the handbills given but at Gate No. 3.

Fe's terminal which was directly related to and necessary for Piggyback's operations, it did not accept the Union's position that its conduct was therefore within the allowable area of primary activity described in *Local 761 v. NLRB*, 366 U.S. 677 (1961) (*General Electric*). The Board reasoned that the "related work" test, as formulated in that decision to determine whether appeals to neutral employees in common work situs situations, was applicable only to "premises not owned or occupied by the primary employer." (Dec., p. 19). The Board thus rejected the related work test and ruled that the so-called *Moore Dry Dock and Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950) criteria were controlling, which the Board found to involve different considerations than those underlying this Court's decision in *General Electric*.

Turning to the *Moore Dry Dock* principles, the Board did not question that a union might picket at a common work situs at an entrance used by suppliers to the primary employer,

but concluded in this case that the employers whose employees were the target of the Union's appeals did not fall into the category of suppliers. Accordingly, the Board found that the Union activity did not conform with the requirement in *Moore Dry Dock* that the picketing be limited to places reasonably close to the dispute, i.e., that the picketing be confined to the gate used by Piggyback personnel and its suppliers.

The Board's order requires the Union to cease and desist from inducing employees of Santa Fe or other persons to refuse from engaging in secondary boycott activity, paraphrasing the words of Section 8(b)(4)(B) of the Act, and further requires the Union to post notices.

THE DECISION OF THE APPELLATE COURT

The Court of Appeals concurred with the Board's analysis. The decision below states:

> "We hold that the Board correctly determined that the "related work" doctrine of *General Electric* and *Carrier* has no application in this case, where the pick-

> eting occurred at premises neither owned by the primary employer nor proximate to the primary employer's premises, and that the *Moore Dry Dock* criteria govern this case."

The Court also adopted the Board's distinction between lawful appeals to the suppliers of a primary employer at a common work situs in an attempt to cause an interruption of work and an appeal to other than suppliers working directly on the job with the primary employer in an effort to cause an interruption in the work that was necessary to the primary employer's operations, which it found to be unlawful. Accordingly, the Court enforced the Board's Order.

ARGUMENT

The decision of the Ninth Circuit departs from the principles adopted by this Court for dealing with union activity directed against an employer located on a common work situs shared with employers who are neutral in the labor dispute, and should be reviewed by this

Court. The questions presented are important and recurring in the administration of the Act and should be resolved.

1. In *General Electric* a union engaged in a primary strike against that employer at a large appliance manufacturing plant where, in the same facility, a substantial number of employees of independent contractors were also at work on various projects for the primary employer including general maintenance work. Pickets appeared at several entrances to the facility, including a gate which for many years had been reserved for use of the independent contractors' employees. This Court examined the picketing at the contractors' gate in the light of the approach to common situs picketing which the Board adopted in *Moore Dry Dock*, 92 NLRB 547 (1950), and generally approved the application of the standards stated in the Board's decision, observing that those standards carry out the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending

employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 592 (1951). Application of the *Moore Dry Dock* principles, however, did not necessarily forbid the picketing at the gate set aside for independent contractors. As the Court explained, "[t]he key to the problem is found in the type of work that is being performed by those who use the separate gate". 366 U.S. at 680. The "controlling considerations" in establishing a separate gate which would successfully bar picketing in these circumstances were stated to be the following (366 U.S. at 681) quoting from *United Steelworkers v. NLRB*, 289 F.2d 591, 595 (2nd Cir. 1961) (366 U.S. at 681):

> "There must be a separate gate marked and set apart from other gates; the work done by the men who use the gate must be unrelated to the normal operations of the employer and the work must be of a kind that would not, if done when the

plant were engaged in its regular operations, necessitate curtailing those operations".

In the circumstances of *General Electric*, accordingly, it was appropriate to remand the case to the Board to determine whether and to what extent the employees who used the separate gate were engaged in "conventional maintenance work necessary to the normal operations of General Electric", because if they were "the use of the gate would have been a mingled one outside the bar of [the secondary boycott provision of the Act]". 366 U.S. at 682.

The factual difference between *General Electric* and the instant case is that the labor dispute involved the owner of the premises, and not, as here, an independent contractor who works on the premises. There is no material factual difference, however, in the nature of the work relationship between the primary and neutral employers in either case. Certainly the contractors in *General Electric* were not suppliers of the primary

employer; rather, they may have been performing "work [at a common situs] necessary to the normal operations of [the primary employer]," in which case they were fair target for lawful union appeals. In the present case, the truck drivers bringing vans to Piggyback, and the Santa Fe employees working directly with Piggyback at the job situs were performing "work necessary to the normal operations" of Piggyback. The correctness of the decisions of the Board and the Appellate Court thus turns on whether the holding in *General Electric* is confined to situations where the primary employer owns or controls the premises where the common work situs exists.

There is nothing in *General Electric* to suggest that the distinction relied on by the Board and the Appellate Court was intended. On the contrary, *General Electric* constitutes this Court's affirmation of the principles adopted in *Moore Dry Dock*, a case where the owner of the premises, unlike the situation in *General Electric* itself, was neutral to

the dispute. In recounting the evolution of the *Moore Dry Dock* approach, this Court quotes the ruling of the Board in *Retail Fruit & Vegetable Clerks (Crystal Palace Market)*, 116 NLRB 856 (1956) "that the foregoing *Moore Dry Dock* principles should apply to all common situs picketing, including cases where, as here, the picketed premises are owned by the primary employer." 366 U.S. at 679-9, quoting from 116 NLRB at 856. In short, *General Electric* would appear to stand for the proposition that ownership or control of the premises involved in common situs labor disputes is not an important component in analysis for purposes of Section 8(b)(4)(B) of the Act. In terms of principle, surely, it should not be. See *United Steelworkers v. NLRB*, 376 U.S. 492 (1964), noting the primary character of picketing "aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt." (under-

scoring added).[2] In sum, the insistence of the Board upon circumscribing separate areas for the application of *General Electric* and *Moore Dry Dock* is unsupportable.

2. Putting aside the application of *General Electric* in the circumstances of this case, the question remains whether the

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[2]Citing *Kinty v. United Mine Workers*, 544 F.2d 706 (4th Cir. 1976), the Appellate Court in this case appears to have attributed to the Union a position which would immunize picketing and other appeals from the ban of Section 8(b)(4)(B) of the Act where the union seeks work stoppages away from the common work situs where the dispute is located. *Kinty* involved that kind of conduct, but this case does not. Here, the Union directed its appeals to a cessation of work at the particular part of the Santa Fe terminal where Piggyback worked, and only to the extent that the work activities of neutral employees were interrelated with and necessary to the normal operations of Piggyback. See *infra*., pp. 16-17.

principles of *Moore Dry Dock* support a justifiable distinction between union appeals to employees of suppliers of a primary employer at a common work situs, and such appeals to employees of employers who perform work on the situs necessary to the normal operations of the primary employer. According to the Board and the Appellate Court, appeals for work interruptions in the former situation are permissible, but such appeals in the latter are not. But, the relevant circumstances are indistinguishable in the two kinds of appeals. In both the union's efforts are calculated to interfere with the work activities of neutral employees that are essential to the primary employer's operations.[3] Ironically, perhaps, *Moore Dry Dock* itself did not involve appeals to suppliers

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[3]Compare Judge Prettyman's discussion in *Seafarers Union v. NLRB (Salt Dome)*, 265 F.2d 585 (D.C. Cir. 1959) of the accomodation between primary and secondary picketing activity at a common work situs.

of the primary employer; rather, the picketing had the effect of preventing the members of craft unions employed by the neutral employer from performing conversion work on the primary employer's vessel. The work of the neutrals which was interrupted by the picketing, was directly related to the operations of the primary employer, and for that reason the impact of the picketing did not remove it from the area of legitimate primary activity.

In the last final analysis the question is not simply one dealing with the scope or application of *Moore Dry Dock*, but rather whether the policy considerations underlying the difference between primary and secondary activity under the Act can rationally accommodate a distinction between a supplier to a primary employer and employees whose services at the situs of the dispute directly interrelate with the work of the primary employer and are essential to the latter's operations. This is an important question which should be

finally resolved.[4]

3. The facts of this case squarely present the issues discussed above. The Union at all times identified Piggyback as the only employer involved in the labor dis-

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[4]There is no occasion in this case to revisit the holding of this Court in *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951), nor application of that decision in the construction industry generally. It is now firmly established that the relationship between a general contractor and its subcontractors, each of which has discrete responsibilities for the construction work, does not legitimize picketing of a job site generally because of a dispute with the general, or for that matter, with one of the subcontractors. That relationship is obviously quite different than the one involved in *General Electric* between the primary employees and the maintenance employees of an outside contractor, and similarly differs from the relevant relationships in this case.

pute. The Union's program was to isolate this primary employer from its source of supply of vans and from the services of others essential to its operation, just as in any conventional primary labor dispute. The Union's care in articulating its singular purpose was meticulous. It accompanied its picketing at Gate No. 3 with a handbill explaining to truck drivers that it was asking that they cease delivering to or picking up vans from Piggyback, but not otherwise asking them to disrupt their normal work. To avoid any misunderstanding, the Union informed United Parcel Service, Santa Fe's principal customer, that the picketing at Gate No. 3 was simply to appeal to drivers "to refuse to perform any work directly related to the Piggy Back Services, Inc. operation". Before instituting picketing at Indian Crossing (Gate No. 5) the Union requested Santa Fe to give it permission to picket inside the railyard directly adjacent to the juncture of the intermodal spurs with the main line, so as to avoid interference with any Santa Fe

trains other than those bringing intermodal traffic to Piggyback's work place. The picketing at the spur switching tracks occurred only when intermodal traffic carrying vans into Piggyback's work location was involved. The Union gave explicit instructions to its pickets at Gate No. 5 to show their signs only when trains pulling intermodal traffic appeared. And finally, Santa Fe employees were given handbills, when picketing was extended to Gate No. 4, explaining that the Union was "not asking [them] to cease any work unrelated to Piggy Back's day-to-day operations".

It would be difficult to express more clearly in a common situs picketing program a purpose to restrict the impact of the labor dispute to the primary employer, and to affect neutrals only to the extent that "the duties of [their] employees were connected with the normal operations of the [primary] employer". *United Steelworkers v. NLRB*, 376 U.S. 492, 497 (1964).

CONCLUSION

For all the reasons stated above, it is respectfully submitted that the Union's Petition should be granted.

DATED: June 29, 1994

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APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner-Cross-Respondent, THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Petitioner-Intervenor,* v. GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS AND AUTOMOTIVE EMPLOYEES OF CONTRA COSTA COUNTY, LOCAL No. 315, *Respondent-Cross-Petitioner.*	No. 92-70417 NLRB Nos. 32-CC-1302 32-CC-1306 OPINION

On Application for Enforcement and
Cross-Petition for Review of an Order of
The National Labor Relations Board

Argued and Submitted
December 15, 1993 San Francisco, California

Filed April 1, 1994

Before: J. Clifford Wallace, Chief Judge,
Leonard I. Garth*
and Charles Wiggins, Circuit Judges.

Opinion by Judge Garth

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*Honorable Leonard 1. Garth, United States Circuit Judge, Third Circuit Court of Appeals, sitting by designation.

SUMMARY

Labor and Employment/Unions/Unfair Labor Practices

The court of appeals enforced an order of the National Labor Relations Board and denied a cross-petition for review of the order. The court held that substantial evidence supported the National Labor Relations Board's conclusion that a union violated the National Labor Relations Act's secondary picketing proscriptions by appealing to employees of neutral employers either to honor its picket line or not perform work at a common situs where an employer with whom it had a dispute conducted normal operations.

Respondent General Truck Drivers, Warehousemen, Helpers and Automotive Employees of Contra Costa County, Local No. 315 (Union), was engaged in a primary labor dispute with Piggyback Services, Inc. The dispute erupted after petitioner-intervenor Atchison, Topeka & Santa Fe Railway Company awarded Piggyback a subcon-

tract to ramp and deramp intermodal freight at Santa Fe's Richmond, California, rail terminal.

The Union picketed and distributed handbills at Santa Fe's Richmond rail terminal. Santa Fe designated a gate, Gate 1, as the sole entrance to the Richmond facility for employees, customers, visitors and suppliers of Piggyback. Santa Fe also posted signs at four other entrances to the Richmond facility, stating that these "neutral" gates were reserved for the exclusive use of Santa Fe's employees, customers, visitors and suppliers. Piggyback employees entered only through Gate 1.

The Union began picketing at the four "neutral" gates, and distributed handbills at neutral locations urging neutral employees and customers entering the Santa Fe railway yard to either honor the picket line or to cease all work related to Piggyback's day-to-day operations. The Union also sent letters to unions that represented Santa Fe employees, requesting that union members employed by Santa Fe not

perform work directly related to Piggyback's operations at the Richmond terminal. The Union sent a similar letter to United Parcel Service (UPS), Santa Fe's primary unionized intermodal trucking customer.

Although no Piggyback employees were stationed at a UPS drop-off site about a mile-and-a-half from one of the neutral gates, the Union expanded its activity to that location. The Union also picketed at two railroad spurs where intermodal freight cars entered the railway yard.

Santa Fe filed unfair labor practice charges against the Union. Petitioner National Labor Relations Board affirmed an administrative law judge's (ALJ's) conclusion that the Union's activities violated the secondary boycott provisions of the National Labor Relations Act. The Board approved the ALJ's order prohibiting the Union from engaging in any picketing and handbilling activity with an object of forcing neutral employers to cease doing business with Santa Fe, and of forcing Santa Fe to cease

doing business with Piggyback.

The Board petitioned for enforcement of its order. The Union cross-petitioned for review of the order.

[1] In this case, the Union's picketing occurred at premises neither owned by the primary employer nor proximate to the primary employer's premises. Thus, the Board's *Moore Dry Dock* standards for common situs picketing governed the case.

[2] The Union's actions in picketing irrespective of the location at the Santa Fe property, and handbilling at the Santa Fe facility, could not be deemed a permissible primary boycott just because neutral employees performed work necessary to the normal operations of the primary employer.

[3] The record supported the Board's finding that a Union objective in picketing and handbilling at the neutral gates and other locations was to enmesh neutral parties in the Union's dispute with Piggyback. **[4]** Santa Fe established separate reserved gates, and the Union had a duty to picket with restraint. **[5]**

Moreover, the finding that Santa Fe and its customers were not Piggyback's "suppliers" was amply supported by the record. Thus, the Board's finding that the Union was engaged in unlawful secondary picketing was warranted.

COUNSEL

Aileen A. Armstrong, Fred L. Cornnell, National Labor Relations Board, Washington, D.C., for the petitioner-cross-respondent.

Ronald W. Novotny, Hill, Farrer & Bumll, Los Angeles, California, for the petitioner-intervenor.

Duane B. Beeson, Beeson, Taylor, Silbert, Bodine & Livingston, San Francisco, California, for the respondent-cross-petitioner.

OPINION

GARTH, Circuit Judge:

The National Labor Relations Board ("Board") petitions for enforcement of its order against General Truck Drivers, Warehousemen, Helpers and Automotive Employees of Contra Costa County, Local No. 315, affiliated with International Brotherhood of Teamsters, AFL-CIO ("Union").

The Atchison, Topeka & Santa Fe Railway Company ("Santa Fe") intervened in support of the Board.

In its cross-petition for review, the Union contends that the Board erred in holding that the Union violated the secondary picketing proscriptions of sections 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act ("Act"), 29 U.S.C. §§158(b)(4)(i) and (ii)(B), by engaging in common situs picketing and handbilling activities conducted with the object of enmeshing Santa Fe and other neutral employers in the Union's dispute with the primary employer.

We find that the Board applied the proper standard for assessing the Union activity, and that substantial evidence supports the Board's findings that the Union violated the secondary picketing provisions of the Act. We, therefore, will enforce the order of the Board, and deny the Union's cross-petition for review.

I.

The facts of this case are not in dispute.

The Union was engaged in a primary labor dispute with Piggyback Services, Inc., a non-union employer. The dispute erupted after Santa Fe awarded Piggyback a subcontract to ramp and deramp intermodal freight[1] at Santa Fe's Richmond, California rail terminal. That work previously had been performed "by union members for a wholly owned subsidiary of Santa Fe. When Piggyback allegedly reneged on its promise to hire the former union workers in July 1990, the Union began picketing and distributing handbills at Santa Fe's Richmond rail terminal.

In an effort to insulate itself from the Union's labor dispute with Piggyback, Santa Fe

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[1]Intermodal freight traffic involves the transportation of freight in trailers and containers. These trailers and containers are transported by Santa Fe on railroad flatcars. Approximately 40% of the train freight traffic at the Santa Fe facility is intermodal; the other "non-intermodal" freight transported by Santa Fe includes the transportation of freight in boxcars, tank cars, and auto transport cars.

designated a gate, Gate 1, as the sole entrance to the Richmond facility for employees, customers, visitors and suppliers of Piggyback. Santa Fe also posted signs at four other entrances to the Richmond facility, designated as Gate 2, Gate 3, Gate 4, and Gate 5, stating that these "neutral" gates were reserved for the exclusive use of Santa Fe's employees, customers, visitors and suppliers, and that Gate 1 was available only for Piggyback's employees, customers, visitors and suppliers.

Although Piggyback employees entered only through Gate 1, and the Union fully acknowledged that it had no labor dispute with Santa Fe, the Union began picketing at the four "neutral" gates. The Union also picketed a fifth neutral gate, Gate 4(b), which was not posted and which was used by Santa Fe's employees to enter and exit the railyard; Santa Fe closed Gate 4(b) after only one day. Much of the Union's picketing commenced after Santa Fe, apparently for safety reasons, declined the Union's request to picket inside the railway

yard where Piggyback employees worked.

Handbills distributed by the Union at neutral locations urged neutral employees and customers entering the Santa Fe railway yard to either honor the picket line or, alternatively, to cease all work related to Piggyback's day-to-day operations. The Union sent letters to the presidents of the seven unions which represented Santa Fe employees; the letters requested that union members employed by Santa Fe not perform work directly related to Piggyback's operations at the Richmond terminal. A similar letter was sent by the Union to United Parcel Services (UPS), Santa Fe's primary unionized intermodal trucking customer.

The union-represented truck drivers of UPS and other Santa Fe customers honored the picket line by refusing to deliver intermodal freight to the Richmond terminal. In response, Santa Fe established a drop-off site about a mile-and-a-half from Gate 3, for use by UPS and other Santa Fe customers. Although no Piggyback employees were stationed at the UPS drop-

off site, the Union expanded its activity to that location. The Union also picketed at two railroad spurs, designated as the West Switching Lead and the Zone 3 Industries, where intermodal freight cars entered the railway yard.

Santa Fe notified the Union that its picketing was unlawful, and that it had filed unfair labor practice charges against the Union. While denying the charges, the Union acknowledged that it was requesting Santa Fe employees not to perform work directly involved in the day-to-day operations of Piggyback Services. Following issuance of a temporary restraining order, all Santa Fe employees returned to work on August 27, 1990.

Applying the standards of *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547, 549 (1950), the Board affirmed the conclusion of the administrative law judge (ALJ) that the Union activities violated the secondary boycott provisions of the Act, 29 U.S.C. §§ 158(b)(4)(i) and (ii)(B). Specifically, the Board found that

the Union's activities were conducted with the object of enmeshing Santa Fe and other neutral employers in the Union's dispute with Piggyback by picketing unlawfully at Gates 2, 3, 4, 4(b), 5, at the West Switching Lead and the Zone 3 Industries spurs, and at the UPS drop-off point. Accordingly, the Board approved with minor modification the ALJ's order prohibiting the Union from engaging in any picketing and handbilling activity with an object of forcing neutral employers to cease doing business with Santa Fe, and of forcing Santa Fe to cease doing business with Piggyback.[2]

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[2]The order of the ALJ, as modified and affirmed by the Board, requires the Union to cease and desist from:

(a) Inducing or encouraging any individual employed by Santa Fe or any other person engaged in commerce or in an industry affecting commerce to engage in, a strike or refusal in the course of his employment to use, manufacture, transport, or to otherwise handle or work on any goods, articles, materials, or

We must uphold decisions of the Board if its findings of fact are supported by substantial evidence and if the Board correctly applied the law. *N.L.R.B. v. O'Neill, 965* F.2d 1522, 1526 (9th Cir. 1992), *cert. denied,* 113 S.ct. 2995 (1993). "'The substantial evidence test is essentially a case-by-case analysis requir-

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commodities, or to perform any services, where an object thereof is to force or require Santa Fe, or any person engaged in commerce or in an industry affecting commerce, to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, Piggyback.

(b) Threatening, coercing, or restraining Santa Fe or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Santa Fe or any other person engaged in commerce to cease using, selling, handling, transporting, or otherwise dealing in the products of, or cease doing business with, Piggyback.

ing review of the whole record.' " *Id.* (quoting *Turcios v. INS*, 821 F.2d 1396, 1398 (9th Cir. 1987)). We defer to the Board's interpretation of the National Labor Relations Act "'if it is reasonably defensible.'" *N.L.R.B. v. United Union of Roofers, Waterproofers & Allied Workers, Local 81*, 915 F.2d 508, 510 (9th Cir. 1990) (citation omitted).

II.

Section 8(b)(4)(B) of the Act prohibits secondary boycott activities calculated to embroil neutral employers and employees in a union's dispute with the primary employer.[3]

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[3] The Act's prohibition against secondary boycotts is contained in section 8(b)(4), which makes it an unfair labor practice for a union:

(i) to engage in, or to induce or encourage any individual employed by any person . . . to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodi-

A union may picket a primary employer at a job situs under the control of a secondary employer only if the picketing is primary in nature. *Iron Workers Dist. Council, Local 29 v. N.L.R.B.*, 913 F.2d 1470, 1475 (9th Cir. 1990); *N.L.R.B. v. Ironworkers Local* 433, 850 F.2d 551, 554 (9th Cir. 1988). An employer, of course, is entitled to establish separate gates for the use of primary and neutral employers. So long as the "neutral" gate is used only by neutral employees or suppliers, a union cannot picket at that gate and must confine its ac-

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ties or to perform any services; or

(ii) to threaten, coerce, or restrain any person . . . where in either case an object thereof is

(B) forcing or requiring any person . . . to cease doing business with any other person . . . *Provided,* that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

29 U.S.C. § 158(b)(4).

tivities exclusively to the gate reserved for the primary employer's use. *Local 761, Int'l Bhd. of Elec., Radio & Mach. Workers v. N.L.R.B. (General Electric), 366 U.S.* 667, 680-81 (1961). Conversely, a substantial mixed use of a "neutral" gate by primary and secondary employees or suppliers compromises the gate's neutrality, thereby permitting union picketing. *Id.* at 681-82; *Local 76 of Int'l Bhd. of Elec. Workers v. N.L.R.B.*, 742 F.2d 498, 501 (9th Cir. 1984).

As a means of distinguishing between primary and secondary boycotts, the Board in *Moore Dry Dock* established a four-part test for determining whether union picketing at a common situs, where both primary and secondary employers are performing work, is a lawful exertion of pressure against a primary employer or is an unlawful secondary boycott. As we understand the *Moore Dry Dock* doctrine, any one of the following four criteria, if violated, can give rise to a rebuttable inference that the Union is engaged in a secondary boycott. By the

same token, a union acts within permissible bounds if: (1) the picketing is limited to times when the situs of the dispute is located on the secondary employer's [Santa Fe's] premises; (2) at the time of the picketing the primary employer [Piggyback] is engaged in its normal business at the situs; (3) the picketing is limited to places reasonably close to the location of the situs; and (4) the picketing discloses clearly that the dispute is with the primary employer [Piggyback]. 92 N.L.R.B. at 549. In this case, the only one of the four *Moore Dry Dock* criteria which the Union was found not to have complied with, and which the Union challenges, is the third criterion; that "the picketing is limited to places reasonably close to the location of the situs." The Board, as we discuss *infra*, found that the Union had not refuted the inference that its picketing objective constituted a secondary boycott.

A.

The *Moore Dry Dock* standards for common situs picketing were explicitly approved by the

Supreme Court in *General Electric*. 366 U.S. at 680-81. *General Electric* teaches that pickets at the primary employer's premises may directly appeal to secondary employees if, but only if, the work of those secondary employees is related to the work done by the struck primary employer. Under the *General Electric* rule, secondary employees delivering goods to or from the primary employer, and secondary employees doing maintenance work necessary for the operation of the struck plant, are engaged in related work. The *General Electric* Court established this new

test to determine whether a union could picket at a gate utilized exclusively by employees of independent contractors who worked on the struck employer's premises. The Court determined that the key to a union's right to picket at a particular gate is the type of work performed by those using it. *Id.*

Where a separate gate on the property of the primary employer is used both by secondary employees doing related work and by secondary.

employees doing unrelated work, the gate will be deemed mingled. Under such circumstances, a union can station pickets at the mingled gate without violating the *Moore Dry Dock* standards, unless the use by secondary employees doing related work is de minimis.

B.

This "related work" rule was later expanded by the Court in *United Steelworkers of America, AFL-CIO v. N.L.R.B. (Carrier)*, 376 U.S. 492, 498 (1963). In *Carrier*, the Court found picketing lawful at a special railroad spur track, located contiguous to the primary employer's property, but owned by and reserved for employees of the neutral railroad to enter the primary employer's property to make deliveries and pick up shipments. The *Carrier* Court identified "[t]he location of the picketing as an important but not decisive factor." *Id.* at 499. Because there was no other place where the union in *Carrier* could have brought home its dispute with the primary employer, the Court determined that "[f]or the purposes of § 8(b)(4)

picketing at a situs so proximate and related to the employer's day-to-day operations [such picketing] is no more illegal than if it had occurred at a gate owned by [the struck employer]." *Id.* at 500.

III.

[1] We hold that the Board correctly determined that the "related work" doctrine of *General Electric* and *Carrier* has no application in this case, where the picketing occurred at premises neither owned by the primary employer nor proximate to the primary employer's premises, and that the *Moore Dry Dock* criteria govern this case.

The Union acknowledges that its picketing and handbilling activity at Santa Fe's Richmond terminal occurred at gates which were posted against use by Piggyback's employees, customers, visitors and suppliers. The Union contends, however, that the interdependency between the operations of Piggyback and Santa Fe justified the Union's appeal to "neutral" employees and customers of Santa Fe not to work

with Piggyback employees in the performance of Piggyback's normal day-to-day operations.

As this case illustrates, the line between primary and secondary boycotts is often blurred in a common work situs situation, especially where, as here, the work of the primary and neutral employees is largely integrated. In order to perform duties essential to Piggyback's operation, Piggyback employees had to remain in constant communication with Santa Fe's employees. Approximately 40% of the rail freight traffic at Santa Fe's Richmond terminal is exclusively intermodal freight, which is freight transported in vans. Piggyback uses heavy equipment supplied by Santa Fe to remove these vans from the flatcars. The vans used to transport intermodal freight are brought to and from the rail yard in trucks owned and operated by Santa Fe's customers and independent truckers employed by Santa Fe. None of these Santa Fe customers and truckers has any contractual relationship with Piggyback, although each must stop at a checkpoint manned by Piggyback em-

ployees, who weigh and inspect the vans for damage and perform other procedures necessary to the intermodal freight rail transport process.

The Union argues that because the work of Santa Fe's admittedly neutral employees and customers was necessary to the normal operation of Piggyback's business, the Union's picketing and handbilling at the reserved neutral gates was justified under *General Electric* and *Carrier*. For this reason, the Union urges that the Board erred in applying the third *Moore Dry Dock* criteria, i.e., that "the picketing is limited to places reasonably close to the location of the situs," rather than the "related work" standards set forth by the Supreme Court in *General Electric,* 366 U.S. 667, and *Carrier,* 375 U.S. 492. We do not agree.

A.

[2] We are not persuaded that the Union's actions in picketing irrespective of the location at the Santa Fe property and handbilling at the Santa Fe facility can be deemed a per-

missible primary boycott, just because neutral employees perform work necessary to the normal operations of the primary employer. Rather, we find the reasoning of the Fourth Circuit in *Kinty v. United Mine Workers of America*, 544 F.2d 706 (4th Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977), compelling. In *Kinty*, the Fourth Circuit held that neither *General Electric* nor *Carrier* applies to picketing away from or not "proximate" to the primary employer's premises, because:

> What the Court was seeking to do in both *[General Electric* and *Carrier]* was to establish a rule for determining when picketing of employees entering the struck facility by a gate leading into the facility, reserved for the exclusive use of third-party employees of third-parties, becomes primary picketing. It was only in that context that the court used the type of work being performed by the employees of the third-parties entering the struck facility as

> the criterion for determining whether the picketing was primary or secondary. It follows that these cases can in no way be deemed authority for [the union's] position.

Id. at 715; *accord Building and Const. Trade Council (Markwell and Hartz)*, 155 N.L.R.B. 319, 323-26 (1965), *enf'd*, 387 F.2d 79, 83 (5th Cir. 1967), *cert. denied*, 391 U.S. 914 (1968).

The union activity at issue in *Kinty* involved indiscriminate picketing not only of the coal operations of the employers whose employees the Union was seeking to organize and with whom alone the union had a labor dispute, but the Union also sought to close down any coal activity or movement in the entire area. Among other holdings, the *Kinty* court addressed the off-site picketing of the mine workers, and held that it was not protected primary picketing.

The Union's argument, if sustained in the instant case, would, as the Fourth Circuit found in *Kinty*, "render the statute powerless

to protect against conduct Congress clearly intended to prohibit." *See* 544 F.2d at 715. The rule proposed by the Union in the instant case "would mean that the location of the picketing would be of no significance in determining whether the picketing was allowable primary picketing or forbidden secondary picketing. So long as the neutral employer rendered services relating to the primary employer's 'day-today operations,' picketing of his employees anywhere, would under this theory, be primary picketing." *Id.*

In *Kinty*, such a rule would have meant that "the utility which provided power for the struck plant could be picketed at the power plant miles away from the situs of the labor dispute and its employees be induced thereby to discontinue work without implicating the statute." *Id.* Here, it would mean that the Union could, with impunity, " 'induce or encourage the employees of [Santa Fe, UPS, and other neutral employers] to engage in a strike or a concerted refusal in the course of their em-

ployment.' " *See General Electric,* 366 U.S. at 672 (citation omitted). Such a result would directly contravene one of the fundamental purposes of section 8(b)(4) of the Act.

B.

The secondary boycott provisions of the Act reflect "the dual congressional objective of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B. v. Denver Bldg. and Const. Trades Council,* 341 U.S. 675, 692 (1951). Contrary to the Union's argument, the place of picketing has always been an important issue in resolving the inherent tension between these dual congressional objectives. *See Carrier,* 376 U.S. at 499; *General Electric,* 366 U.S. at 680; *Kinty,* 544 F.2d at 713-14 and n.13. Indeed, among the requirements of the *Moore Dry Dock* test – explicitly approved by the Supreme Court in *General Electric* – is the requirement that

the picketing be limited to places "reasonably close to the situs." 92 N.L.R.B. at 549.

Neither *General Electric* nor *Carrier* supports the Union's position that the "related work" test applies within the context of this case, and we can conceive of no principled basis for expanding the standards of *General Electric* and *Carrier* to encompass the situation presented here, i.e., picketing at sites on the premises of a neutral employer, which sites are not reasonably proximate to the struck facility. Here, the Union readily acknowledges that it appealed directly to Santa Fe's employees and customers to honor the Union picket line although it had no labor dispute with Santa Fe or other neutral employers at the Richmond facility. Adopting the Union's argument would eviscerate the intent of Congress to shield neutral employers from labor disputes that are not their own. The rule proposed by the Union runs counter to our own jurisprudence, *see, e.g., Iron Workers Dist. Council, Local 29,* 913 F.2d at 1475 (1990) (applying

Moore Dry Dock criteria to determine whether picketing on secondary employer's premises is primary or secondary); *Carpenters Local 470 v. N.L.R.B.*, 564 F.2d 1360, 1362 (9th Cir. 1977) (related-work test not intended for common situs construction projects), and that of our sister circuits. *See, e.g., Kinty,* 544 F.2d 706; *Riverside Coal Co. v. United Mine Workers of America,* 410 F.2d 267, 272-73 (6th Cir.) (refusing to apply related-work doctrine of *General Electric* and *Carrier* to union appeals to independent haulers not proximate to the struck mines), *cert. denied,* 396 U.S. 846 (1969).

IV.

As we previously observed, the ALJ and the Board found that the Union had not complied with the third *Moore Dry Dock* criteria, namely, that the picketing take place reasonably close to the situs. *See* 92 N.L.R.B. at 549. This finding creates an inference that the Union's activity was secondary. *Iron Workers Dist. Council, Local 29,* 913 F.2d at 1476. Because the *Moore Dry Dock* rule is an evidentiary tool, any

inference of secondary activity created by a union's noncompliance with the *Moore Dry Dock* standards can be refuted if the totality of the circumstances indicates that the union's objective was not secondary. *Id.*

[3] "The secondary boycott provisions in 8(b)(4)(B) prohibit a union from inducing employees to refuse to handle goods with the object of forcing any person to cease doing business with any other person." *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 222 (1982) (footnote omitted). The Board and the ALJ found that the Union's picketing, when viewed in the context of the valid reserve gate system in effect at Santa Fe's Richmond rail terminal during the time of the picketing, warranted the inference that the Union engaged in the picketing with an objective proscribed by the secondary boycott provisions. We must enforce the Board's order if an objective of the Union in its picketing and handbilling activities at the neutral gates and other locations was unlawfully designed to

enmesh neutral parties in the Union's dispute with Piggyback, even if this was not the *sole* object of the Union's activities. *Id.* at 224 and n.21. Our independent review of the record supports the Board's finding that the Union had such an unlawful objective.

A.

[4] The focus of our inquiry is the object of the Union's picketing and handbilling. *International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 433 v. N.L.R.B.*, 598 F.2d 1154, 1158 (9th Cir. 1979). Because separate reserved gates were properly established, the Union had a duty to picket with restraint so as to minimize its impact on neutral employers and their employees. *Allied Concrete, Inc. v. N.L.R.B.*, 607 F.2d 827, 830-31 (9th Cir. 1979). The ALJ and the Board found that the Union had failed to comply with the *Moore Dry Dock* guideline by not confining its picketing related activity to Gate 1, the primary gate established for Piggyback's employees and suppliers. Thus, if there is substan-

tial evidence to support this finding, there is no inference of primary activity. "To the contrary, the inference is that the activity was secondary." *Iron Workers Dist. Council, Local 29,* 913 F.2d at 1476.

The Union does not dispute that it picketed and distributed handbills appealing to the employees of Santa Fe and other neutral employers at Gates 2, 3, 4, and 5, although these gates were designated as "neutral" gates, and were not used by Piggyback employees, customers, visitors, and suppliers. The Union also does not deny that it conducted similar activities at the UPS drop-off point, although no Piggyback employees were stationed at the drop-off point, or that it picketed trains at locations designated as the West Switching Lead and the Zone 3 Industries spurs. These concessions create a fair inference that the Union's objective was secondary. *International Ass'n of Bridge, etc. Workers,* 598 F.2d at 1158.

The Union attempts to justify its picketing and appeals to employees of neutral employers

as a primary boycott on the ground that Santa Fe and its customers are "suppliers" of Piggyback. It is true, as the Union argues and the Board acknowledges, that a union at a common situs may picket the primary employer's supplier, i.e., any employer that delivers materials for the direct use of the primary employer in the normal course of its business. *See J.F. Hoff Elec. Co. v. N.L.R.B.*, 642 F.2d 1266, 1274 (D.C. Cir. 1980), *cert. denied,* 451 U.S. 918 (1981); *accord Iron Workers Local 433,* 294 N.L.R.B. 182, 183 (1989). The Union errs, however, in characterizing Santa Fe and other neutral employers as "suppliers" of Piggyback merely because they move intermodal freight into a position that enables Piggyback to transfer it between Santa Fe's flatcars and the trucks of Santa Fe's customers.

[5] The test applicable to picketing of direct suppliers of primary employers is not as broad as *General Electric's* related-work test. *Hoff,* 642 F.2d at 1272-73 and n.7. The right to picket a "supplier" applies only where the

other employer's goods or services are for the direct and exclusive use of the primary employer. *Id.* at 1275. In this case, the Board affirmed the ALJ's findings that:

> [The intermodal freight delivered to Piggyback was not supplied for the purpose of having Piggyback's employees "use" the freight; that is, to load or unload the intermodal freight onto and off of the railroad flatcars. Rather, the outgoing intermodal freight was supplied to Piggyback's employees by the neutral truckers for Santa Fe's "use"; for Santa Fe to transport to its destination. The incoming intermodal freight was supplied to Piggyback's employees by Santa Fe's employees for Santa Fe's customers' "use"; for delivery to Santa Fe's customers by the customers' truckers. Therefore, considering the context of the delivery of the intermodal freight to Piggyback's employees, it is clear that neither Piggyback, nor Santa Fe,

> nor Santa Fe's customers, nor Santa Fe's customers' truckers, considered Santa Fe's customers or Santa Fe's employees to be suppliers of Piggyback . . .

[E.R. at 33.] The finding that Santa Fe and its customers were not Piggyback's "suppliers" is amply supported by the record. Since the Union acknowledged that it had picketed at Gates 2, 3, 4, 4(b), and 5, the West Switching Lead and Zone 3 Industries spurs, and the UPS drop-off point, the Board's finding that the Union was engaged in unlawful secondary picketing, in violation of 8(B)(4)(i) and (ii)(B) of the Act, was warranted.

B.

The unlawful secondary object of the Union's picketing is further evidenced by the Union's appeals to neutral employees to respect the Union's picket line at the Richmond facility, and also by the Union's appeals to Santa Fe's employees to refuse to do any part of their daily work which involved Piggyback's operation. Those appeals were contained in hand-

bills distributed by Union picketers at Gates 2, 3, 4, 4(b), and 5, reserved for the neutral employers, and are reflected in letters sent by the Union to Santa Fe's management, to Santa Fe's largest customer at the Richmond terminal, UPS, to the unions representing Santa Fe's Richmond terminal employees, and to Santa Fe's lawyer. The record reveals that:

At Gate 3, the Union distributed handbills addressed, "TO DRIVERS ENTERING THE RAIL YARD," appealing to the truck drivers entering at this location with the following request:

> Teamsters Local 315 is asking you to respect our picket line against Piggy Back [sic] Services, Inc.
>
> If you are here to pick up or drop a trailer, you will be dealing directly with employees of Piggy Back Services, Inc. We are asking you not to do that.
>
> If you are a Teamster, you have a right under your Union contract not to do busi-

ness with this unfair employer. If you are not a Union member, you still have legal rights.

[E.R. at 12.] The Union also wrote a letter to UPS, Santa Fe's largest customer for intermodal freight at the Richmond rail terminal, explaining the picketing at Gate 3 in the following manner:

> The picketing is presently being relocated at the gate where UPS drivers normally enter the rail yard to pick up and deliver trailers. The pickets will be appealing to all drivers entering the premises who do business directly with Piggy Back Services, Inc., to refuse to perform any work directly related to the Piggy Back Services, Inc. operation.
>
> The present work operation . . . requires drivers entering the premises to deal directly with the employer performing the ramping and deramping services

(now Piggy Back Services, Inc.) as a part of the pick up and/or delivery of trailers. Piggy Back Services, Inc. is the primary employer involved in this labor dispute, and Local 315 is entitled to request other employees to honor our picket line against this Employer by refusing to work directly with its personnel.

[E.R. at 12-13.]

At Gate 5, handbills distributed by the Union were addressed, "TO EMPLOYEES WORKING IN SANTA FE RAILWAY YARD," and read in pertinent part:

We are asking you to refuse to deliver railcars to Piggy Back employees to work on, refuse to work with Piggy Back employees, and refuse to perform switching services to enable Piggy Back employees to do their work. We are not asking you to cease any work unrelated to Piggy Back's day-to-day operations.

[E.R. at 13.] Similarly-worded handbills were

distributed to Santa Fe's employees at Gates 2, 4 and 4(b).

Additionally, the Union sent letters to the presidents of seven unions that represent Santa Fe's employees employed at the Richmond rail terminal. These letters informed the union presidents of the Piggyback labor dispute, and stated:

> We have been sanctioned by the International Brotherhood of Teamsters to picket Piggyback Services and we are picketing some of the entrances to the Richmond Yard. Road crews (trains) have been going through our lines both when entering and exiting the Piggyback Services, Inc. facility. We have handed out fliers (see enclosures) informing Railroad employees of our labor dispute with Piggyback Services and asking for their support and to please recognize our sanctioned picket line.
>
> Our members have talked to some of the

> Railroad Union employees and have been told that they have received no instructions regarding our picket lines.... [W]e need the support and respect of our lines by other Local Unions. If you can notify your [various union members] that the Teamsters Union members at Richmond, California are engaged in a lawful and sanctioned strike and that each person has the right to honor a picket line without jeopardizing their jobs, it would be of great benefit towards a settlement with Piggyback Services, Inc.
>
> * * *
>
> The reason for this letter is two-fold: first . . .; second, to seek your assistance and cooperation in informing your members that we are on strike and to please honor our picket lines if they come in contact with our picketers.

[E.R. at 14-15.]

In concluding that the Union's picketing had an unlawful secondary objective, the Board and

the ALJ further considered a letter sent to Santa Fe's lawyer by the Union's lawyer, advising that if Santa Fe would allow Union pickets inside the railyard directly adjacent to the work performed by Piggyback, "the Union will cease picketing at entrances to the yard used by employees who work with Piggyback Services in its day to day operations." [E.R. at 28.]

The content of the handbills distributed by the Union to neutral employees, and the wording of the letters sent by the Union to Santa Fe and the presidents of unions representing Santa Fe employees, support the findings of the Board and the ALJ that the Union's objective in making these appeals was unlawfully to enmesh neutral employers in its dispute with Piggyback, and not to communicate effectively with Piggyback.

V.

Substantial evidence therefore supports the Board's conclusion that the Union violated the secondary picketing proscriptions of sections

8(b)(4)(i) and (ii)(B) by appealing to employees of neutral employers either to honor the picket line or, in the case of Santa Fe employees, not to perform work at the common situs where Piggyback conducted its normal operations. " 'Not only are the findings of the Board conclusive with respect to questions of fact . . . but the Board's interpretation of the Act and the Board's application of it [even] in doubtful situations are entitled to weight.' " *General Teamsters Local 959, State of Alaska v. N.L.R.B.*, 743 F.2d 734, 736 (9th Cir. 1984) (quoting *N.L.R.B. v. Denver Bldg. and Constr. Trades Council*, 341 U.S. 675, 691-92 (19S1)). In light of the deference we accord decisions of the Board, we will enforce the Board's order in this case. *See N.L.R.B. v. O'Neill*, 965 F.2d at 1526; *N.L.R.B. v. United Union of Roofers, Local 81*, 915 F.2d at 510.

VI.

The order of the Board, reported at 306 NLRB 118, will be ENFORCED. The Union's cross-petition for review will be DENIED.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL TRUCK DRIVERS,
WAREHOUSEMEN, HELPERS AND
AUTOMOTIVE EMPLOYEES OF
CONTRA COSTA COUNTY,
LOCAL NO.315,
AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
AFL-CIO[1]

and

Cases 32-CC-1302
32-CC-1306

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY

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[1] The name of the Respondent has been changed to reflect the new official name of the International.

DECISION AND ORDER

On August 7, 1991, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief. and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

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[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent,

General Truck Drivers, Warehousemen, Helpers and Automotive Employees of Contra Costa County, Local No. 315, affiliated with International Brotherhood of Teamsters, AFL—CIO, Richmond, California, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the reserved gate system was not tainted during the Respondent's picketing and handbilling, we have considered the testimony of Picket Captain Milo Peyovich that various companies made deliveries to the primary, Piggyback, at Gates 2, 3, and 5 during the picketing. The record does not establish that these deliveries were ''goods for the direct use'' of Piggyback, so as to

Substitute the following for paragraph 1(b).

''(b) Threatening, coercing, or restraining Santa Fe or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Santa Fe or any other person engaged in commerce to cease using, selling, handling, transporting, or otherwise dealing in the products of, or cease doing business with, Piggyback.''

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render the companies ''suppliers'' of the primary employer, see (Chris Crane), 294 NLRB 182, 183 (1989), nor does it establish that these deliveries occurred before the picketing and handbilling was extended to these gates. Moreover, Peyovich testified that he did not report the claimed breaches of neutrality to Santa Fe at the times they are alleged to have occurred. Accordingly, the Respondent has not demonstrated that picketing of the neutral gates was at any time in response to deliveries by neutral employers. See San Francisco Building Trades Council (Goold Electric), 297 NLRB No. 177, JD slip op. at 16 (Mar. 27, 1990).

Dated, Washington, D.C. March 6, 1992

Dennis M. Devaney, Member

Clifford R. Oviatt, Jr., Member

John N. Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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3 We have modified the judge's recommended Order because a broad remedial order is unwarranted in view of our finding that the Respondent discontinued its unlawful picketing and handbilling 2 days after the issuance of a temporary restraining order and the absence of record evidence that the Respondent has engaged in previous similar violations. See Iron Workers Pacific Northwest Council (Hoffman Construction), 292 NLRB 562 (1989); Iron Workers Local 378 (McDevitt & Street), 298 NLRB No. 143, JD slip op. at 10 fn. 5 (June 28, 1990). The judge's notice is consistent with this narrow Order.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

SAN FRANCISCO BRANCH OFFICE

GENERAL TRUCK DRIVERS,
WAREHOUSEMEN, HELPERS AND
AUTOMOTIVE EMPLOYEES OF
CONTRA COSTA COUNTY, LOCAL NO. 315,
affiliated with INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA, AFL-CIO

and

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

Cases 32-CC-
32-CC-

Patricia M. Milowicki, for the General Counsel.

Beeson, Tayer, Silbert, Bodine & Livingston, by Duane B. Beeson, for the Respondent.

Hill, Farrer & Burrill, by Ronald W. Novotny, for the Charging Party.

DECISION

Statement of the Case

JERROLD H. SHAPIRO, Administrative Law Judge: This proceeding, in which I conducted a hearing on March 13-14, 1991, is based upon unfair labor practice charges filed by The Atchison, Topeka and Santa Fe Railway Company (Santa Fe), in Cases 32-CC-130~ and 32-CC-1306, on July 13, 1990 and August 25, 1990 respectively, and upon a consolidated complaint issued on November ~0, 1990 b~; a Regional Director of the National Labor Relations Board (Board), on behalf of the Board's General Counsel. The consolidated complaint, which was amended on February 26, 1991 and at the start of the hearing, alleges in substance that during July and August 1990 Piggyback Services, Inc. (Piggyback) was under contract with Santa Fe to provide ramping and deramping services for Santa Fe at Santa Fe's Richmond, California terminal and that Teamsters Local No. 315 (Respondent) at this time was engaged in a primary labor dispute with Piggyback. The amended consolidated complaint further alleges in substance

that Respondent during July and August 1990 picketed and distributed handbills at Santa Fe's Richmond, California terminal and picketed a drop off site established by Santa Fe in the vicinity of the terminal and that, in violation of Section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act (Act), an object of the aforesaid picketing and handbilling was to force or require Santa Fe and other persons to cease doing business with Piggyback.

Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs filed by the parties, I make the following:

Findings of Fact

I. Jurisdiction and the Respondent's Status as a Labor Organization

Santa Fe, a Delaware corporation, owns and operates an interstate railroad, including an intermodal rail and truck terminal in Richmond, California. During a 12-month period material to this case, Santa Fe derived revenues in excess of $50,000 from the interstate transportation of freight.

Piggyback, an Ohio corporation with facilities and/or operations located throughout the United States, is in the business of providing ramping and deramping services for railway companies. During the time material, Piggyback had a contract with Santa Fe to provide ramping and deramping services to the latter at its Richmond, California intermodal terminal. During a 12-month period material to this case, Piggyback in the course and conduct of its business operations at Santa Fe's Richmond, California intermodal terminal provided services valued in excess of S50,000 to Santa Fe.

During the time material herein, Santa Fe had a contract with United Parcel Service (UPS), to transport UPS's van by rail to and from Santa Fe's Richmond, California terminal.

Santa Fe and UPS are now, and have been at all times material herein, persons engaged in commerce or in an industry affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Piggyback is now, and has been at all times material herein, a person and an employer en-

gaged in commerce or in an industry affecting commerce within the meaning of Section 2(1), (2), (6) and (7) of the Act.

Respondent is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. The Evidence

1. The Setting

Santa Fe operates a rail terminal in Richmond, California, where it employs approximately 205 employees, including engineers, switching crews, mechanical employees, track maintenance employees and clerical employees, all of whom are represented by seven different railroad craft unions. These employees perform all of the work connected with Santa Fe's operations at the Richmond terminal except, as described infra, that part of the operation which concerns the ramping and deramping of the terminal's intermodal freight. Santa Fe contracts this work to Piggyback, which is in the business of providing ramping and deramping services for railroad companies and maintains

facilities throughout the United States. Piggyback's employees employed at the Richmond terminal are represented by Respondent.

Santa Fe's Richmond terminal handles two kinds of rail freight relevant to this case. Approximately 40 percent of the rail freight traffic is "intermodal"; the transportation of freight in trailers and containers. The trailers and containers, sometimes referred to herein collectively as vans, are transported by Santa Fe on railroad flatcars. The other kind of freight transported by Santa Fe, which is relevant to this case, has been referred to during the hearing as simply "non-intermodal," and includes the transportation of freight in boxcars, auto transport cars, gondolas, and tank cars.

All of the Richmond terminal's incoming and outgoing rail traffic uses a single "main line" track at the east end of the terminal which crosses a road a few hundred yards from the terminal, known as Indian Crossing. Approaching the rail yard from Indian Crossing, the main track branches into multiple tracks within

the yard. Four of these tracks lead to an area on the north side of the yard known as the intermodal or ramp area where vans are loaded onto and off of railroad flatcars. The four tracks dedicated to the intermodal work are numbered 160 through 163. Additional tracks within the yard are used for other traffic, and for switching purposes.

At the west end of the rail yard, crossed by a freeway overpass, there are two spur tracks relevant to the events in this case. One is called the West Switching Lead, which proceeds in a fairly straight line through a tunnel and into an area known as Point Richmond. The other spur curves to the south, proceeds along Cutting Boulevard, and then to an industrial area at the Port of Richmond, about 2 miles from the rail yard; it is designated as the Zone 3 Industries spur. 4 third spur at the east end of the yard leads to the Chevron Oil Refinery.

Approximately 60 freight trains enter and exit the Richmond terminal each day. Some of the trains are used exclusively to transport intermodal freight, and are directed to the

tracks leading into the intermodal area of the rail yard. Other trains include a mixture of flatcars carrying intermodal freight and cars carrying non-intermodal freight. Although less than a majority of all freight entering and leaving the rail yard is intermodal, the majority of the trains carry at least some intermodal freight. If there are a substantial number of flatcars carrying intermodal freight in a train, the train proceeds directly to the intermodal area of the rail yard, and its non-intermodal railroad cars are switched onto other tracks. If there are only a few flatcars carrying intermodal freight in the train, the train goes to the main switching area, and the intermodal cars are switched onto tracks 160-163, the tracks leading to the yard's intermodal area. The West Switching Lead and the Zone 3 Industries spur, as well as the tracks at Indian Crossing, are used for this purpose. However, during the normal course of business, the Zone 3 Industries spur is used very infrequently as a switching spur for intermodal freight traffic, because the Zone 3 Industries

spur's very tight turns make it dangerous to use for switching the 89-foot flatcars used to transport the intermodal freight.

The south boundary of the Richmond terminal is bordered by South Garrard Boulevard, along which there are entrances to the rail yard. A fenced area, referred to at the hearing as Gate 1, just to the west of a freeway overpass, provides access to the rail yard generally. It appears that this entrance, which was used during the events material to this case, is not used during the normal course of business. To the east of Gate 1, and on the other side of the freeway overpass, Santa Fe and Piggyback occupy an office building at 303 South Garrard Boulevard. There is walk-in and vehicle traffic from South Garrard Boulevard to this building and its adjacent parking lot, but this entrance does not provide access to the terminal's rail yard; this entrance is referred to in the record as Gate 2. Further east on South Garrard Boulevard is Gate 3, the entrance used by the trucks of Santa Fe's customers which haul the containers and trailers (vans). Approximately

600 vans are transported in and out of this entrance daily. Several hundred yards further east on South Garrard Boulevard is a building, where Santa Fe maintains additional offices. There are two entrances to the rail yard in this area, referred to as Gates 4 and 4(b) respectively, used principally by Santa Fe's employees, including train crews, maintenance of way crews and other craft employees. Finally the motor road which intersects with the main railroad line at Indian Crossing also leads to an access road into the terminal's rail yard, and is used by Santa Fe's employees, as well as by suppliers of Piggyback.

2. The work performed by Piggyback's employees

Santa Fe has a contract with Piggyback pursuant to which Piggyback performs ramping, deramping and related services in connection with Santa Fe's intermodal freight operations at the Richmond, California rail terminal. Piggyback performs this service on a fee-per-lift basis and, by the terms of its agreement with Santa Fe, is obligated to operate "as an inde-

pendent contractor to [Santa Fe]."

As described in more detail below, Piggyback uses heavy equipment furnished by Santa Fe to place vans on railway flatcars and to remove vans from, railway flatcars in the intermodal area of the terminal's rail yard, moves these vans to and from the area in the yard where the truckdrivers have deposited them, does repair and maintenance work on the equipment used for these purposes, inspects and weighs the vans as they move in and out of the rail yard, and performs other tasks in connection with Santa Fe's intermodal freight operation.

All of the vans used to transport intermodal freight handled at Santa Fe's Richmond, California terminal are transported to and from the terminal's rail yard through Gate 3. They are transported in trucks, owned and operated by Santa Fe's customers or independent truckers whom Santa Fe's customers employ. Neither Santa Fe's customers nor the independent truckers have a contractual relationship with Piggyback. Each truck, as it enters and exits the rail yard through Gate 3, must stop at a check-

point near the gate manned by Piggyback's employees. There, all loaded vans are weighed and all vans are inspected for damage by Piggyback's employees. A form generated by a Santa Fe computer is used by Piggyback's checkpoint employees to indicate the condition of the van, and is signed by the truckdriver and by a Piggyback employee. The Piggyback employee then inputs this information into the main computer frame of Santa Fe. In those instances when a truckdriver leaves the rail yard with a loaded or empty van, the driver must again go through the above-described checkpoint procedure upon exiting the yard.

As part of the usual checkpoint procedure concerning intermodal freight, the following additional business contacts between the truckdrivers and Piggyback's employees occur: if a truckdriver does not know where, in the rail 50 yard, to take the van he is carrying, the driver is furnished with this information at the checkpoint by a Piggyback employee; if a fully loaded van is to be transported immediately to a railroad flatcar, rather than to the

area in the rail yard where the vans are usually left by the truckdriver, the truckdriver is given this instruction by a Piggyback employee, either at the 55 checkpoint or in the rail yard; if a truckdriver is instructed by his employer to return with an empty trailer, the truckdriver is informed at the checkpoint by a Piggyback employee where, in the rail yard, the trucker will find an empty trailer to hook up to his tractor; and, truckdrivers occasionally ask one of Piggyback's hostler's for assistance in hooking up trailers to their tractors r and/or for assistance in "flipping" a van from one truck chassis to another.

The person in charge of Piggyback's day-to-day operations at the Richmond terminal is its terminal manager. The terminal manager, along with several employees of Piggyback classified as coordinators, and one or two clericals employed by Piggyback, occupy- an office in the building adjacent to Gate 2, which also contains the offices of Santa Fe's Director of Intermodal Services and Santa Fe's clerical employees. Piggyback's terminal manager spends

approximately! 60 percent of his time in his office regularly conferring and communicating with various Santa Fe employees, including the assistant train masters and others, in order to facilitate the intermodal operation and to resolve problems which his subordinates encounter in the performance of their job duties. The terminal manager makes daily visits to the checkpoint, the ramming and deramping areas, and the maintenance area, and during those visits speaks to various employees of Santa Fe, including the assistant train masters and mechanical department personnel, in order to effectively discharge his managerial duties, which include resolving those problems which prevent Piggyback's employees from effectively performing their jobs at the terminal.

Piggyback's coordinators are in continuous communication with Santa Fe's assistant train masters. The coordinators, who are on duty 24 hours a day, are responsible for making sure the right railroad flatcars and vans are on the right railroad tracks at the right time, so

they may be handled by Piggyback's ramping and deramping employees as scheduled. In order to perform their duties, the coordinators communicate constantly with Santa Fe's assistant train masters and with other Santa Fe personnel, in order to get the track assignment of trains, information about the spotting of flatcars, and other information indispensable for Piggyback to perform its ramping and deramping work at the terminal. It is undisputed that the coordinators would not be able to perform their duties, which are essential to Piggyback's operation, without the information furnished to them by Santa Fe's personnel.

Piggyback's employees also work together with Santa Fe's mechanical department's repair personnel to repair the locking mechanism on a flatcar when it malfunctions, and because of this prevents Piggyback's employees from either loading or unloading a van from the flatcar. This occurs approximately ten times weekly. In addition, Piggyback's and Santa Fe's employees work together to make sure that each van is securely locked onto its flatcar, be-

fore it leaves the ramming area or the rail yard. Piggyback's employees are initially responsible for securing the van to the flatcar. Each locking device is then doubled checked by a Santa Fe employee, who, if he is not satisfied, will direct a Piggyback employee to resecure the van to the flatcar or otherwise to correct the problem.

Piggyback's and Santa Fe's employees must also coordinate their work in connection with "switching" of railroad cars. An important safety procedure calls for both groups of employees to be responsible for opening and closing safety gates which swing up and down at either end of tracks where work is being performed, or to admit trains into or out of areas where work is to be performed. For example, whenever switching of cars occurs in or out of the intermodal area of the rail yard, "flag" protection is the responsibility ofthe craft or employee group requiring protection against an unauthorized entry into the area by an engine. Piggyback's employees have authority to release cars to Santa Fe's operating employees for switching

purposes. In order to coordinate this procedure there is frequent communication between Piggyback personnel and Santa Fe's personnel. Similarly, Piggyback's yard supervisors coordinate car movements with Santa Fe's assistant train masters to create a "split" in a train—to open a gap between two cars by uncoupling them—in order to permit Piggyback's hostlers access between the staging area where the vans are kept and the tracks, without having to drive completely around a long freight train.

The movement of trains into or out of the rail yard's intermodal area is not permitted until the gate is opened, and then closed behind the train, by a Piggyback employee. In this regard, each incoming intermodal train, for example, requires a Santa Fe assistant train master to notify a Piggyback employee of its arrival, whereupon the Piggyback employee drives to the area where the intermodal spur leaves the main line, opens the gate, and shuts it after the train has moved through.

3. Respondent's picketing and handbilling activity

Respondent admits that throughout the events material to this case it was engaged in a primary labor dispute with Piggyback and did not have a labor dispute with Santa Fe. The nature of Respondent's dispute with Piggyback was not the subject of testimony, but this much can be gleaned from the record concerning the dispute. Prior to the events in this case, Respondent had a long-time collective-bargaining relationship with Santa Fe Terminal Services, Inc. (Terminal Services), a wholly owned subsidiary of Santa Fe, which performed the same ramming and deramping services for Santa Fe at Santa Fe's Richmond railroad terminal, as described in detail supra. Santa Fe discontinued the use of Terminal Services on June 30, 1990[1] and awarded a contract to Piggyback for the same work. Piggyback began its operations

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[1] Unless otherwise specified all dates hereinafter refer to the year 1990.

in Santa Fe's Richmond terminal on July 1. Respondent began its picketing and its other actions described hereinafter, when, as it asserted, Piggyback reneged on a promise to hire the former Terminal Services' employees, who had been represented by the Respondent, to perform the work.

Picketing activity was commenced by Respondent at the Richmond terminal on July 2 at Gate 1, the second day after Piggyback began performing under its contract with Santa Fe. As of that time Santa Fe had posted a sign at Gate 1 which stated, in substance, that the gate was reserved exclusively for the use of Piggyback's employees, visitors, customers, and suppliers, and that Santa Fe's employees, visitors, customers and suppliers should enter the terminal through Gates 2 and 3. The pickets stationed at Gate 1 carried signs with the following legend:[2]

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[2] The same picket sign language was used by Respondent for all of the picketing described hereinafter.

PIGGYBACK SERVICES LOCK OUT

UNFAIR TO TEAMSTERS LOCAL 315

Respondent continuously picketed at this gate with the above-described picket sign until August 29, when its dispute with Piggyback ended.

Gates numbered 2, 3, 1 and 5, which have been described supra, were subsequently picketed by Respondent at various times in July and August. These gates, at the times of Respondent's picketing, had been posted with signs which stated, in substance, that the gates were reserved for the exclusive use of Santa Fe's employees, visitors, customers and suppliers and that Piggyback's employees, customers, visitors and suppliers should enter the terminal through Gate 1 and gave the located of Gate 1.

On July 12 the Respondent expanded its picketing to Gate 3 and distributed handbills to the truckdrivers entering at this location, reading:

TO DRIVERS ENTERING THIS RAIL YARD

Teamsters Local 315 is asking you to re-

spect our picket line against Piggy Back Services, Inc.

If you are here to pick up or drop a trailer, you will be dealing directly with employees of Piggy Back Services, Inc. We are asking you not to do that.

If you are a Teamster, you have a right under your Union contract not to do business with this unfair employer. If you are not a Union member, you still have legal rights. Call the National Labor Relations Board (273-7200).

TEAMSTERS LOCAL NO. 315

Respondent picketed and handbilled at this gate continuously until August 29, when its dispute with Piggyback ended.

On July 12, the day it extended its picketing to Gate 3, Respondent wrote United Parcel Service, Santa Fe's largest customer for intermodal freight at the Richmond rail terminal,[3] ex-

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[3] UPS accounts for 25 percent of Santa Fe's intermodal business, and is the single largest trucker using the Richmond rail terminal.

plaining its dispute with Piggyback and stating the reasons for picketing Gate 3. In this last respect, the letter reads as follows:

> . . . The picketing is presently being relocated at the gate where UPS drivers normally enter the rail yard to pick up and deliver trailers. The pickets will be appealing to all drivers entering the premises who do business directly with Piggy Back Services, Inc., to refuse to perform any work directly related to the Piggy Back Services, Inc., operation.
>
> The present work operation . . . requires drivers entering the premises to deal directly with the employer performing the ramping and deramping services (now Piggy Back Services, Inc.) as a part of the pick up and/or delivery of trailers. Piggy Back Services, Inc.is the primary employer involved in this labor dispute, and Local 315 is entitled to request other employees to honor our picket line against this Employer by

refusing to work directly with its personnel.

As a consequence of the picketing at Gate 3, the union-represented truckdrivers, including the drivers employed by UPS, refused to cross the picket line. To maintain the flow of intermodal business, Santa Fe established a "drop off" point on a public street near Gate 3 for the use of UPS and the other union truckers. Santa Fe arranged for the services of outside trucking companies to pick up the trucks at this location, drive them through Gate 3, through the check point, and into the staging area assigned to Piggyback for the ramming and deramping of intermodal freight. These trucks were then returned to the drop off point, perhaps with a loaded or empty trailer, where the regular drivers picked them up and drove them away. In the case of the UPS trucks, the ferrying of vans into and out of the rail terminal was performed by UPS supervisors.

On August 10 the Respondent further extended its picketing and handbilling to Gate 5, the

entrance to the rail yard at Indian Crossing. Respondent picketed with the same signs it was using at Gates 1 and 3, but the handbills distributed at this location were addressed, "TO EMPLOYEES WORKING IN SANTA FE RAILWAY YARD," and after describing Respondent's labor dispute with Piggyback, the handbills read as follows:

> We are asking you to refuse to deliver railcars to Piggy Back employees to work on, refuse to work with Piggy Back employees, and refuse to perform switching services to enable Piggy Back employees to do their work. We are not asking you to cease any work unrelated to Piggy Back's day-to-day operations.
>
> This is your fight as well as our, because YOU COULD BE NEXT.

The picketing and handbilling continued at this location for the duration of Respondent's dispute with Piggyback.

Prior to the establishment of the picket line

at Gate 5, Santa Fe's hub manager at the Richmond terminal, Wildon Thibeaux, a subordinate of Ray Applebaugh, Santa Fe's director of intermodal services at the Richmond terminal, received a letter dated July 30 from Respondent's Secretary-Treasurer George Sveum, which reads as follows:

> Dear Mr. Thibeaux:
>
> I am writing to request that Teamsters Local 315 be given access to Railway property in order to further its labor dispute with Piggy Back Services, Inc.
>
> Under existing practices, one or more employees of Piggy Back Services is responsible for unlocking and opening, and subsequently locking three gates at the east end of the yard to provide rail trains with connecting lines to tracks 160, 161 and 163 in making pickups and deliveries of trailers. Local 315 wishes to place pickets at these gates whenever a Piggy Back Services employee is per-

forming the work involved. The gates, however, are located well inside the boundaries of Railway property, and our pickets cannot patrol in that area absent Railway permission. We are accordingly asking that the Railway allow pickets to come onto its property for this limited purpose.

Local 315 will be happy to discuss with Railway representatives the arrangements and conditions for such picketing to take place so that there will be no disruption of activities of any employer other than those which might be incidental to lawful picketing against Piggy Back Services, and also to assure compliance with all appropriate security rules and regulations. Please call to schedule a meeting for this purpose. It is our intent to engage in this activity at the earliest possible time, and I am accordingly requesting a promptresponse to this letter.

Applebaugh testified Santa Fe received this letter on or about July 30, that to his knowledge Santa Fe did not answer the letter, and further testified that he would have known if Santa Fe had answer the letter.[4] On the subject of whether it would have been feasible for Santa Fe to have invited Respondent's pickets onto Santa Fe's premises to picket, as requested in Sveum's July 30 letter to Thibeaux, Applebaugh testified:

The facility [referring to Santa Fe's

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[4] There is a dispute as to whether or not Santa Fe answered Sveum's July 30 letter. The parties stipulated that L.C. Jenkins, Santa Fe's assistant vice president for Intermodal Terminal Operations and Services, whose office is in Chicago, Illinois, if called to testify would have testified that he had caused to be sent to Sveum Charging Party's Exhibit No. 5, a letter dated August 6, acknowledging Sveum's July 30 letter, and stating, in pertinent part, that Santa Fe declined to allow Respondent's

> Richmond railway terminal] is a totally integrated facility. We cannot invite the unions into the facility because there is not room for them to picket safely. Also there would not be a way to segregate the unions from the railroad's craft employees.

Jerry Fraizer, Santa Fe's relief assistant superintendent during the time material, also testified it would have been unsafe for the pickets to have picketed inside the rail yard. Applebaugh's and Fraizer's testimony was not denied or otherwise contradicted by the record as a whole.

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pickets to come onto Santa Fe's property for the purpose of picketing Piggyback, "because of safety, security and liability concerns, among others, Santa Fe Railway's policy is not to allow individuals on its property except when their presence is related to Santa Fe's business." Sveum credibly testified that Respondent received no such letter.

Also prior to the start of the picketing at Gate 5, which gate is used by various employees employed by Santa Fe to enter the railway yard, on August 8 Respondent sent letters to the Presidents of the seven unions that represent Santa Fe's employees employed at the Richmond terminal. These letters, identical in content, informed the unions about Respondent's labor dispute with Piggyback and described the nature of the dispute and the importance of the dispute to the several unions which represent the railroad's employees, and with respect to Respondent's picketing in connection with the dispute, stated:

> We have been sanctioned by the International Brotherhood of Teamsters to picket Piggyback Services and we are picketing some of the entrances to the Richmond Yard. Road crews (trains) have been going through our lines both when entering and exiting the Piggyback Services, Inc. facility. We have handed out fliers (see enclosures) informing Railroad employ-

ees of our labor dispute with Piggyback Services and asking for their support and to please recognize our sanctioned picket line.

Our members have talked to some of the Railroad Union employees and have been told that they have received no instructions regarding our picket lines. In order for us to be be [sic] able to resolve this problem, and to put our members back to work, we need the support and respect of our lines by other Local Unions. If you can notify your Santa Fe Railroad members, Northern California Division, that the Teamsters Union members at Richmond, California are engaged in a lawful and sanctioned strike and that each person has the right to honor a picket line without jeopardizing their jobs, it would be of great benefit towards a settlement with Piggyback Services, Inc.

* * *

> The reason for this letter is two-fold: first . . .; second, to seek your assistance and cooperation in informing your members in this area that we are on strike and to please honor our picket lines if they come in contact with our picketers.

As I have indicated previously, while a substantial number of the trains entering and exiting the Richmond terminal carry some intermodal freight, some of these trains carry no intermodal freight whatsoever. In connection with Respondent's picketing at Indian Crossing, its picket captains Milo Peyovich and Charles Russell, Jr., instructed the persons who picketed on behalf of Respondent that they were to picket only trains made up, in whole or in part, of intermodal flatcars, and not to interfere with trains comprised exclusively of non-intermodal freight.[5] Also, when Peyovich and Russell were at Indian Crossing

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[5] Based upon the credible testimony of Peyovich and Russell and picket John Krebs.

during the picketing, they observed that their instructions were being obeyed; that exclusively non-intermodal freight trains were not being picketed. However, Peyovich and Russell were present at Indian Crossing during the picketing for only a few hours each day, during the 24-hours each day that the pickets were stationed at this location, and Russell was not present after August 25, when he was hospitalized.[6]

During the period when Peyovich and/or Russell were not present to supervise the picketing at Indian Crossing, the record reveals that on certain occasions the pickets ignored their instructions and picketed trains which carried exclusively non-intermodal freight. In this

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[6] I also note that picket John Krebs, a picket for Respondent at Indian Crossing who credibly testified that while he was there the pickets did not picket the trains which contained no intermodal freight, was able only to picket intermittently, albeit on a daily basis, due to a leg injury .

regard, it is undisputed that when the pickets stationed at Indian Crossing observed a train approach with one or more cars carrying-ing intermodal freight, their procedure was to leave the gate and approach the tracks with their picket signs and to hold up or wave the signs so that the train's engineer's could see that they were picketing. The testimony of Jerry Fraizer and John Herndon establishes that the picketsstationed at Indian Crossing on several occasions acted in this manner when trains approached the crossing hauling only non-intermodal freight. Santa Fe Relief Superintendent Fraizer testified he observed the pickets wave their signs and stop a non-intermodal freight train on the afternoon of August 10,[7] and testified he regularly observed the Indian Crossing pickets picket trains which exited from the non-intermodal section of the rail yard.[8] Fraizer further testified he observed the Indian Crossing pickets approach the rail-

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[7] I note that when Fraizer was shown Santa Fe's records which identified the non-intermodal

road tracks and wave their signs at completely non-intermodal freight trains as they approached the crossing, as follows:[9] one train on August 23; one train on August 18; two trains on August 16; two trains on August 15; and, on several occasions between August 24 and August 27, observed the pickets waive their picket signs toward a switch engine moving oil tankers into the Chevron Oil facility which is accessed off of the Indian Crossing track. Santa Fe's general supervisor of train handling, Herndon, testified that during the 6-

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freight trains which entered and exited the terminal on August 10, he testified he was not able to recall whether he observed any one of those trains stopped at Indian Crossing due to the pickets' conduct.

[8] Fraizer did not testify that those trains were completely non-intermodal freight trains.

[9] I note that the credible testimony of picket captain Peyovich, which was corroborated by Santa Fe's general supervisor of train handling, John Herndon, establishes it was very

day period commencing on or about August 10, that whenever a train approached Indian Crossing at night, which was when he was on duty, that the Indian Crossing pickets took their picket signs, went to within 6 to 10 feet of the railroad tracks, and stood on both sides of the tracks with their signs and did this regardless of the type of train involved; whether the train carried intermodal freight or was a completely non-intermodal freight train.[10]

In concluding that Respondent specifically instructed its pickets that they were to picket only freight trains which carried at least one or more intermodal freight cars and not to interfere with trains comprised exclusively of

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[10] As I have indicated supra, Herndon testified that it was difficult for the pickets to determine whether trains approaching Indian Crossing were completely non-intermodal, except for the case of one very short train which exited from the rail yard, with only 10 to 12 boxcars.

non-intermodal freight cars, I considered the testimony of Jim Fitzgerald and Robert Golden that they were informed by pickets, in effect, that they had been instructed to stop trains carrying only non-intermodal freight, as well as trains carrying intermodal freight.

Fitzgerald, Santa Fe's hub manager, testified that on about August 24 while at Indian Crossing with Santa Fe Mechanical Foreman Charles Hunter, for the purpose of moving an inbound train across Indian Crossing comprised of 10 tank cars, which they had been notified had stopped there on account of the picketing, that Foreman Hunter pointed out to picket John Krebs that this train was not carrying intermodal freight and asked Krebs whether it was the subject of the picketing, and that Krebs replied by telling Hunter, "I don't know . . . I'm doing what I've been told to do," or used words to that effect. Foreman Hunter did not testify. Krebs denied having this conversation and further testified he never had a conversation with Foreman Hunter.

Santa Fe Relief Train Master Golden testi-

fied that, on a date he does not remember, during the picketing at Indian Crossing, he was called to the crossing to move a switch engine which was not hauling any cars, and which he had been notified had stopped at the crossing due to the picket line. Golden further testified that before moving the switch engine he spoke to two of the pickets, a man and a woman, who were standing near the switch engine, and asked then, to move out of the way of the switch engine. According to Golden, the pickets, whose names he testified he does not know, but whom he described in detail physically, responded by not moving and stating, "no, we're stopping all the trains," or used words to that effect.[11] Respondent's picket captain, Peyovich, who personally knew all of the Respondent's pickets, testified that no one picketed for Respondent who fitted the descriptions given by Golden of the two pick-

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11 During the picketing herein Santa Fe's supervisors, including Golden, were instructed to report anything of significance that oc-

ets whom he attributed the above-conduct.[12]

I rejected Fitzgerald's and Golden's above testimony because their testimonial demeanor was not good and because Kreb's and Peyovich's testimonial demeanor was good when Kreb's denied having the conversation with Foreman Hunter and when Peyovich testified that the persons described by Golden did not picket for Respondent.

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curred in connection with the picketing, yet Golden made no note of this incident and did not mention it to anyone because, he testified, he did not believe that what occurred was important. Golden reluctantly admitted that he first mentioned this occurrence to Respondent's attorney the night before he testified.

[12] In his initial testimony and at times during his later testimony about this episode, Golden, in describing what was said, attributed the above remarks to both of the pickets. However, when questioned specifically about this he testified that only one of the pickets, the man, spoke.

On August 10, and continuing thereafter until August 29, when Respondent's dispute with Piggyback ended, Respondent engaged in intermittent picketing at the railroad spurs identified as the West Switching Lead and Zone 3 Industries. Picketing occurred in those areas only when traffic moved on those spur tracks. The pickets stationed at Gate 1 could observe rail traffic on the West Switching Lead and when this occurred hurried over to that location. The pickets, when at either Gate 1 or the West Switching Lead, were able to observe rail traffic when it moved on the Zone 3 Industries spur, and when that occurred hurried over to that location.

Picket Captains Peyovich and Russell issued the same instructions for picketing to the pickets stationed at the rail yard's west end as were issued to those stationed at the rail yard's east end; the pickets were instructed that only trains which hauled one or more intermodal freight cars were to be picketed, when involving in the switching operations for which these spur tracks were used, and that

trains with only non-intermodal freight cars should not be picketed. Peyovich and Russell credibly testified that during the times they were present at the West Switching Lead and the Zone 3 Industries spur, during the period of the picketing, that their instructions were obeyed; that they observed the pickets picket only trains which were hauling one or more intermodal freight cars. But, as was the case with their presence at the east end of the yard, Indian Crossing, they were not present for the vast majority of the time encompassed by the picketing in this case.

In contending that the picketing instructions issued by Peyovich and Russell were not observed at the rail yard's west end, the General Counsel and Charging Party cite the testimony of Santa Fe's Relief Assistant Superintendent Fraizer. During the period of the picketing, Fraizer toured the rail yard in a car every 2 to 3 hours during his shift, which resulted in his driving by the areas encompassed by the West Switching Lead and the Zone 3 Industries rail spur approximately six times

daily.

Fraizer testified that when he drove by the West Switching Lead he observed pickets waving their picket signs at "all trains" and that he observed the trains all stop, and that the trains which stopped had non-intermodal freight traffic on them. He did not testify, however, that the picketed trains he was referring to, consisted of solely non-intermodal freight cars. In view of the fact that the record reveals that a substantial number of intermodal freight cars, perhaps a majority of the cars switched on the West Switching Lead, are flatcars carrying intermodal freight, it would be impermissible for me to infer that Fraizer was referring to trains consisting entirely of non-intermodal freight cars.[13]

Regarding the picketing at the Zone 3 Industries spur, Fraizer's testimony consists of the following question and answer: "With respect to Zone 3 Industries, did you observe any

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[13] I reject Counsel for the General Counsel's contention that Respondent picketed a daily

picketing going on in the Zone 3 Industries track?", answer, "yes." He did not testify that he observed the pickets at this location picket wholly non-intermodal freight trains. I have considered the record reveals, as I have found supra, that normally intermodal freight cars do not move on the Zone 3 Industries spur because of the configuration of the track, but, as I have also found, the record establishes that occasionally when the West Switching Lead is unable to accommodate the switching of flatcars carrying intermodal freight, that the Zone 3 Industries spur is used for this purpose. Moreover, Peyovich and Russell credibly testified that during the period of the picketing herein, they observed the Zone 3 Industries spur being used to switch cars in-

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boxcar run which moved through the West Switching Lead to a Ford Motor Parts Warehouse, inasmuch as Fraizer testified he did not personally observe the pickets conduct themselves in this fashion, but was informed of this by other Santa Fe supervisors.

volving trains which contained intermodal freight cars.

In view of the foregoing circumstances, I find that the record fails to establish that Respondent, during the time material, picketed trains which consisted entirely of non-intermodal freight cars at either the West Switching Lead or the Zone 3 Industries spur.

On August 24 Respondent extended its picketing and handbilling at Santa Fe's Richmond rail terminal to Gates 2 and 4,[14] and continued to engage in that activity at those gates until August 29, when Respondent's dispu-te with Piggyback ended. The handbills distributed by the pickets at these gates were titled,

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[14] On August 24 Santa Fe opened a gate adjacent to Gate 4, identified in the record as Gate 4(b), which Santa Fe's employees used to enter and exit the rail yard. This gate was not posted and when Respondent observed it was being used, commenced to picket and handbill at that location. On August 25 Santa Fe closed Gate 4(b).

"TO EMPLOYEES WORKING IN SANTA FE RAILWAY YARD", and after stating Respondent had a labor dispute with Piggyback and describing the nature of the dispute, further stated:[15]

> We are asking you to refuse to deliver railcars to Piggy Back employees to work on, refuse to work with Piggy Back employees, and refuse to perform switching services to enable Piggy Back employees to do their work. We are not asking you to cease any work unrelated to Piggy Back's day-to-day operations.

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[15] In its answer to the consolidated complaint Respondent admitted that the handbill distributed by the pickets at Gates 2 and 9 was worded differently than the handbill described herein. However, at the start of the hearing, all of the parties to this proceeding stipulated that the handbill described herein, not the one pleaded in the complaint, was the one handed out by Respondent's pickets at Gates 2 and 4.

This is your fight as well as ours, because YOU COULD BE NEXT.

TEAMSTERS LOCAL 315

As indicated previously, Gate 2 is located at an office building, and its adjacent parking lot, where both Piggyback and Santa Fe employees worked. The record reveals that after Gate 2 was posted with a sign reserving it exclusively for the employees, suppliers, etc. of Santa Fe, that Respondent's Picket Captain Peyovich observed that the posted instructions were violated on two occasions: once he observed a UPS deliveryperson use Gate 2 to make a delivery to Piggyback's office; and, once he observed another delivery service use Gate 2 to make a delivery to Piggyback's office. Respondent never reported those violations of Santa Fe's posted instructions to either Santa Fe or Piggyback.

As described supra, when, on July 12, Respondent commenced its picketing at Gate 3, the union represented truckdrivers employed by Santa Fe's customers, who transported the vans

used for carrylng lntermodal freight into and out of Gate 3, refused to cross the picket line. This caused Santa Fe to establish a drop-off point on a public street near Gate 3, where an exchange of equipment took place between the union truckdrivers and their supervisors (or other non-union truckdrivers), who drove the vans through Gate 3 to Piggyback's intermodal work area in the rail yard, and then made the return trip to the drop-off point where the regular truckdrivers took over. Subsequently, on about August 14, Santa Fe moved this drop-off point to a vacant lot located approximately 1-1/2 miles from the rail yard, which is referred to in the record as the UPS drop-off point. The activity at the UPS drop-off point was the same as at the previous drop-off area; the exchange of equipment between the union truckdrivers and their supervisors (or other non-union truckdrivers), who drove the vans through Gate 3 to Pigg~back's intermodal work area, and then returned to the UPS drop-off point with a loaded or empty van, for the union driver to transport back to his employer's

facility.

Prior to August 28, Respondent did not picket or handbill at the above-described drop-off points. On the evening of August 28 Respondent commenced to picket and handbill at the UPS drop-off point, and engaged in this conduct until on August 29 its dispute with Piggyback ended. Respondent's pickets stationed at the UPS drop-off point distributed the identical handbill at this location on August 28-29 as were being distributed at Gate 3.

Beginning on August 24, in the evening, and continuing through August 27, Santa Fe's employees, all of whom are represented by unions, refused to cross the Respondent's picket lines located at Gates 2, 4, 4(b) and 5,[16] to report for work. This significantly interfered with the operation of Santa Fe's Richmond rail terminal. In order to continue to operate the rail terminal during this period, Santa Fe used its

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16 The remaining gate posted for neutral employers' employees, Gate 3, was not used by Santa Fe's employees to enter or exit the facility.

supervisory personnel, some of whom came to the terminal from other Santa Fe rail terminals.

On August 25, Santa Fe's attorney sent a mailgram to Respondent's attorney stating, in substance, that Respondent's picketing at Gate 4 as well as its picketing at the Indian road crossing tracks, the West Switching Lead and Zone 3 Industries was unlawful and had the intended effect of shutting down the rail yard and stopping the movement of goods and materials which were completely unrelated to Santa Fe's intermodal operations, and that because of this conduct Santa Fe had filed unfair labor practice charges against Respondent and a Section 303 suit for damages in the U.S. District Court. Respondent's attorney replied by mailgram, dated August 27, denying the illegality of Respondent's activity and stating, in substance, that Respondent's picketing was confined to entrances through which employees entered the rail yard to perform services directly related to the work of Piggyback and that Respondent was not asking Santa Fe's em-

ployees to refrain fron, entering the yard or from doing work unrelated to Piggyback, but was "requesting employees not to perform work directly involved in the day-to-day operations of Piggyback Services." The mailgram ended with this offer:

> I am authorized . . . to offer to place the Union's pickets inside the rail yard directly adjacent to the work performed by Piggyback Services. If this offer is accepted, the Union will cease picketing at entrances to the yard used by employees who work with Piggyback Services in its day to day operations.

There was no response to this offer.

On August 27, at 6:30 p.m., Santa Fe obtained a temporary restraining order against the several craft railroad unions, who represent Santa Fe's employees, enjoining those unions from respecting Respcndent's picket lines and directing those unions to instruct the employees they represent to cross the Respondent's picket lines or face union discipline. As a result,

all of the Santa Fe employees returned to work that evening. Two days later, August 29, Respondent settled its dispute with Piggyback and all picketing and handbilling ceased.

B. Discussion

1. Introduction and Applicable Principles

The amended consolidated complaint alleges, in substance, that Respondent's above-described picketing and handbilling, except for that which occurred at Gate 1, violated Section 8(b)(4)(i)(ii)(B) of the Act, because an object of the picketing and handbilling, which accompanied the picketing, was to force and require Santa Fe and other neutral employers to cease doing business with Piggyback, the primary employer herein. The principal question litigated was whether the legality of the Respondent's picketing should be evaluated under the Board's Moore Dry Dock [17] criteria, as

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[17] Sailor's Union of the Pacific (Moore Dry Dock), 92 NLRB 547 (1950).

contended by the General Counsel and the Charging Party, or, as contended by Respondent, under the standards set forth b~ the Supreme Court's decisions in Local 761, International Union of Electrical, Radio and Machine Workers, AFk-CIO (General Electric Co.), 366 U.S. 667 (1961), and United Steelworkers of America, AFL-CIO(Carrier Corp.) v. NLRB, 376 U.S. 492 (1964), herein for the sake of convenience referred to as General Electric and Carrier CorPoration. I am of the opinion that the Board's Moore Dr~ Dock rules govern the legality of the Respondent's picketing.

> Section 8(b)(9) of the Act makes it an unfair labor practice for a union:
>
> (i) to engage in, or to induce or encourage any individual employed by any person . . . to engage in a strike or a refusal in the course of his employment to use, . . . process . . . or otherwise handle or work on any goods, . . . or to perform any services; or

(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industrv affecting commerce, where in either case an object thereof is:

(B) forcing or requiring any person . . . to cease doing business with any other person, ... Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

* * * *

Provided Further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of labor organizations, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are

distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

These provisions reflect "the dual congressional objective of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." NLRB v. Denver Building and Constructions Trades Council, 341 U.S. 675, 692 (1951). As explained in NLRB v. Local 825, OPerating Engineers (Burns & Roe, Inc.), 400 U.S. 297, 302-303 (1971):

> Congressional concern over the involvement of third parties in labor disputes not their own prompted Section

8(b)(4)(B). This concern was focused on

> . . . pressure brought to bear, not 'upon the employer who alone is a party [be a dispute], but upon some third party who has no concern with it' with the objective of forcing the third party to bring pressure on the emplo~er to agree to the union's demands.
>
> Section 8(b)(4)(B) is, however, the product of legislative compromise and also reflects a concern with protecting labor organizations' right to e~ert legitimate pressure aimed at the employer with whom there is a primary dispute (footnotes omitted).

Thus, Section 8(b)(4)(B) requires that disputed union conduct be classified either as legitimate "primary" activity directed against the offending employer or as unlawful "secondary" activity directed against the neutral employer with whom the union has no dispute.[18]

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[18] It is unnecessary to find that the sole

General Electric, 366 U.S. at 672-673 (1961).

Where the primary employer and the neutral employer occupy separate work sites, the necessary line-drawing is relatively easy. Generally speaking, union picketing occurring at the primary employer's premises and seeking only the disruption of his normal operations is considered primary and thus 35 protected activity, whereas picketing extending beyond the premises of the primary employer to those of the neutral employer and designed to disrupt the latter's operations is secondary and prohibited. Compare, NLRB v. International Rice Milling Co., 341 U.S. 665, 672 (1951), with NLRB v. United Brotherhood of CarPenlers, 184 F.2d 60 (10th Cir. 1950).

However, where the primary and neutral employers perform separate work on the same premises, more difficult problems frequently arise.

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object of picketing is unlawful; an unlawful object is enough. NLRB v. Denver Building and Constructions Trades Council, 341 U.S. 675 688-689.

In such "common situs" situations, the union's right to direct legitimate pressure against the primary employer, despite the pro~imity of other neutral parties, must be accommodated with the neutral's intended immunity from the full impact of the labor dispute. Accordingly, in such cases, it is necessary to draw a line frequently "more nice than obvious" (General Electric, 366 U.S. at 674) between union activity which is properly limited to the primary employer and union activity designed to take advantage of the common situs by using neutral parties as a wedge against the primary employer.

As an aid in drawing this line, the Board, in Moore Dry Dock, supra, 9 NLRB at 549, developed certain criteria which were held to be "presumptive" of valid primary activit~. These criteria were summarized by the Supreme Court in General Electric, as follows (366 U.S. at 677):

> (1) that the picketing be limited to times when the situs of dispute was located on the secondary premises; (2) that

the primary employer be engaged in his normal business at the situs; (3) that the picketing take place reasonably close to the situs; and (4) that the picketing clearly disclose that the dispute was only with the primary employer.

The Moore Drv Dock criteria were not meant to establish a rigid formula for determining the legality of common situs picketing. Rather, the doctrine "simply establishes an evidentiary aid for the Board to determine the object of picketing, where the other evidence is equivocal." NLRB v. Northern California District Council of Hod Carriers, 389 F.2d 721, 725 (9th Cir. 1968). Therefore, mere compliance with the four requirements of the Moore Dry Dock case does not immunize a union's picketing, for a union may, by its other conduct, reveal that its objective is secondary. General Teamsters Local No. 126 et al., 200 NLRB 253 (1972).

In General Electric, the union picketed the premises of General Electric, with whom it was engaged in a labor dispute, at a gate used by

the primary employer and also at a gate reserved exclusively for independent contractors and their employees, who were regularly working on those premises. In deciding General Electric, the Supreme Court reviewed the origins of the Moore Dry Dock standards and noted that they were first developed to govern situations in which the primary employer was working at premises not his own. The Court also noted, however, that the Board had subsequently applied the standards to cases in which the picketing took place at the premises owned and operated by the primary employer. 366 U.S. at 676-679. In general, the Court approved such application where the work done by the secondary employers was "unconnected to the normal operations of the struck employer—usually construction work on his buildings." 366 U.S. at 680. In such a case, the Court held, the primary employer may erect a "gate" and direct that the secondary employers enter the primary employer's premises only through the gate reserved for this purpose, and if the

union pickets at the gate reserved for the secondary employers, it has failed to comply with the third Moore Drv Dock standard that picketing be conducted as close as possible to the situs of the primary employer's operations, and the picketing is accordingly unlawful. 366 U.S. at 681. On the other hand, if the work of the secondary employer's employees is related to that of the normal operations of the primary employer, the Court ruled that the secondary employer's employees may be freely picketed at the primary employer's premises no matter which gate they enter.[19] 366 U.S. at 680, 681.

In Ceneral Electric the Supreme Court remanded the case to the Board for consideration

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19 In so holding, the Court reasoned that employees who perform routine maintenance jobs for the primary employer are very much akin to those who make "regular plant deliveries" and that under those circumstances, "the barring of picketing . . . would make a clear invasion on traditional primary activity of appealing

of the nature of the work done by General Electric's independent contractors; the Court ruled that if a substantial amount of the work were found to be "conventional maintenance work necessary to the normal operations of General Electric, the use of the gate would have been a mingled one outside the bar" of the statute [emphasis in the original] 366 U.S. at 682.

Subsequently, in Carrier Corporation, the Supreme Court approved the Board's application of the rule which the Supreme Court formulated in General Electric, so as to permit as legitimate primary action, picketing of a gate owned by a railroad, but cut through a fence surrounding the struck employer's premises. This gate was used exclusively by neutral railroad employees entering the struck employer's premises to perform delivery activities relating to the normal operations of the struck employer. In applying its General Electric deci-

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to neutral employees whose tasks aid the [primary] employer's everyday operations." 366 U.S. at 681.

sion to the facts of Carrier Corporation, the Supreme Court explained (376 U.S. at 498-499):

> We think General Electric's construction of the proviso to Sec.8(b)(4)(B) is sound and we will not disturb it. The primary strike, which is protected by the proviso, is aimed at applying economic pressure by halting the day-to-day operations of the struck employer. But Congress not only preserved the right to strike; it also saved "primary picketing" from the secondary ban. Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations, which the strike is endeavoring to halt. In light of this traditional goal of primary pressures we think Congress intended to preserve the right to picket during a strike a gate reserved for em-

ployees of neutral delivery men furnishing day-to-day service essential to the plant's regular operations (citation omitted).

In Building & Construction Trades Council, etc. (Markwell and Hartz), 155 NLRB 319, 323-326 (1965), enfd., 387 F.2d 79, 83 (5th Cir. 1967), the Board held, inter alia, that the General Electric "related work" test was limited to picketing at the premises of the primary employer, and that picketing which occurs at a situs not owned or customarily occupied by the primary employer is to be tested solely by the original Moore Dry Dock criteria. The Board concluded that the Supreme Court's decisions in General Electric and Carrier Corporation were not intended to "override[e] this historic distinction" based on the location of the picketing. The Board also concluded that the "related work" test as formulated in General Electric, and applied in Carrier CorPoration, is simply an additional qualification imposed in such a case because of the

Act's "policy that lenient treatment be given to strike action taking place at the separate premises of a struck employer." Since there is no such policy in the case of picketing occurring at premises not owned or occupied by the primary employer, the Board concluded that there is no necessity in that instance for a "related work" test. Judge Rives added in his concurring opinion in Markwell & Hartz, Inc. v. NLRB, supra, 387 F.2d at 84:

> [Even] when the work done by the secondary employees is related to the normal operations of the primary employer there remains a distinction between picketing at the situs of the primary employer and picketing at a common situs where two or more employers are performing separate tasks on common premises. It seems to me that the opinion in General Electric clearly recognizes that distinction and approves the four Moore Dry Dock standards as applicable to common situs picketing.

In the more than 29 years that have passed since the Supreme Court's decision in General Electric, neither the Board or a court of appeals have applied General Electric's related work test, rather than the Moore Dry Dock criteria, to a case involving picketing at the premises of the neutral employer. To the contrary, the Board in Dalton Schools,[20] specifically indicated it will not apply the related work test formulated in General Electric, rather than the Moore Dry Dock test, in cases involving picketing at the premises of the neutral employer.

In Dalton Schools a union picketed a school, including entrances reserved for the school's employees and persons making deliveries to the school. The union was picketing because of its labor dispute with a maintenance contractor whose employees worked in the school. The union

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[20] Local 32B-32J, Service Employees International Union, AFL-CIO (The Dalton Schools), 248 NLRB 1067 (1980).

relied upon the General Electric case to justify its blanket picketing of the neutral employer's premises. In evaluating the union's picketing by the Moore Dry Dock criteria, rather than by the test set forth in General Electric, as urged by the union, the administrative law judge, reasoned (248 NLRB at 1069):

> Respondent's reliance on the General Electric theory supra is misplaced as such doctrine is inapplicable in the present circumstances where the primary dispute is against the independent contractor supplier of services and not the separate employer occupier of the premises to whom the services were supplied. To follow Respondent's view would be to grossly distort the purposes of the General Electric doctrine by permitting secondary picketing based merely upon similarity or relatedness in the work of the primary struck supplier and a portion of the work done by its customer. By twisting logic, Respondent

> suggests that primary strikes against independent contractors could lawfully be spread to enmesh allcustomers of such contractors who under existing law are otherwise neutrals in the dispute. Such a view is patently without merit

In adopting the judge's conclusion that the union's picketing violated Section 8(b)(4)(B), the Board specifically rejected the union's argument that under the theory enunciated in General Electric the union's picketing was not proscribed by Section 8(b)(4)(B). In rejecting this argument, the Board relied upon the judge's above-described reasoning. 248 NLRB at 1067, fn. 2.

The Court of Appeals for the Fourth Circuit in Kinty v. United Mine Workers of America, 544 F.2d 706 (4th Cir. 1976), has also indicated it will not apply the related work test enunciated in General Electric and Carrier Corporation to picketing at the premises of a neutral employer. Kinty was a suit for damages brought by several employers against the United Mine

Workers (UMW) under Sections 301 and 303 of the Act, for allegedly picketing those employers in violation of the Act's secondary boycott provisions. The UMW urged, among other things, that its picketing was "traditional primary picketing," when viehed in the light of General Electric and Carrier Corporation. 549 F.2d at 713. In rejecting this argument the court (544 F.2d at 713-715), found that factually both General Electric and Carrier Corporation concerned picketing at the premises of the employer with whom the primary labor dispute existed, whereas the case before the court did not concern that type of picketing, and therefore the court rejected the UMW's argument that the Supren,e Court's decisions in General Electric and Carrier CorPoration were applicable to the UMW's picketing, because (544 F.2d at 715):

> What the Court was seeking to do in [General Electric and Carrier Corporation] was to establish a rule for determining when picketing of employees entering the

struck facility by a gate leading into the factility [sic], reserved for the exclusive use of third party employees of third-parties, becomes primary picketing. It was only in that context that the Court used the type of work being performed by the en,ployees of the third-parties entering the struck facility as the criterion for determining whether the picketing was primary or secondary (footnote omitted.) It follows that these cases can in no way be deemed authority for defendant's position.

The argument of the defendant, if sustained, would mean that the location of the picketing would be of no significance in determining whether the picketing was allowable primary picketing or forbidden secondary picketing. So long as the neutral employer rendered services relating to the primary employer's "day-to-day operations," picketing of his employees anywhere, would under this

> theory, be primary picketing. . . . This contention, which would . . . make practicallv all picketing primary, would render the statute powerless to protect against conduct Congress clearly intended to prohibit.

I conclude, as did the Board in Dalton Schools and the court in Kinty, that the Supreme Court's "related work" test, as formulated in General Electric and applied in Carrier Corporation, was not meant to apply to a union's picketing at the premises of a neutral employer. In my opinion, based upon the reasoning of the Board's decisions in Dalton Schools and Markwell & Hartz and the court's decision in KintY, the legality of Respondent's picketing of the neutrals herein, must be determined by the Moore Dry Dock criteria and without regard to whether the work of Santa Fe or the other neutral employers doing business with Santa Fe was "related" to the normal operations of Piggyback, for the applicability of the "related work" principle depends on whether the picket-

ing takes place at the primary employer's premises, whereas here it took place at the premises of the neutral employer.

2. The Application of the Moore DrY Dock criteria to the picketing

The only one of the four criteria set forth in Moore DrY Dock which the Respondent is accused of not complying with is the third criteria; that the picketing take place reasonably close to the situs. In applying the "reasonably close to the situs" criteria, the Board, with court approval, has long held that employers may "by the use of separate gates for the purpose of [the primary employer's] ingress to and egress from the job site, lawfully force the union to picket only those 'separate gates.'" Plumbers Local 519 v. NLRB, 416 F.2d 1120, 1125 (C.A.D.C.,1969). ~hen such separate reserved gates are properly established, the union, as part of its obligation to minimize the secondary effects of common situs picketing, must act with restraint to avoid extend-

ing its appeal to those jobsite access points used only by neutral employers and their employees. International Assoc. of Bridge, etc., Local 433 v. NLRB, 598 F.2d 1154, 1156 (9th Cir. 1979). Under the Moore Dry Dock criteria, picketing that extends beyond the gate established for the primary emplover and its employees and suppliers is "strongly indicative of a secondary, proscribed object." Ramey Construction Co. v. Local 544, Painters, 472 F.2d 1127, 1131 (5th Cir. 1973). It creates the inference that the union is pursuing unlawful, secondary objectives. See, CarPenters Local 470 v. NLRB, 564 F.2d 1360, 1363 (9th Cir. 1977).

In the instant case, in an effort to insulate itself from the Respondent's labor dispute with Piggyback, Santa Fe posted a sign at Gate 1 of its Richmond rail terminal designatlng that gate as the exclusive entrance for the employees, visitors, customers and suppliers of Piggyback, and posted signs at Gates 2, 3, 4 and 5 stating that those gates were reserved for the

exclusive use of Santa Fe's employees, visitors, customers, and suppliers, and that Piggyback's employees, customers, visitors, and suppliers, should enter the terminal through Gate 1. Respondent was well aware of the above-described reserved gate systenl. Nonetheless, as described in detail supra, Respondent extended its picketing well beyond Gate 1, the gate established for Piggyback's employees and suppliers, and picketed at several access points to the terminal used by the employees of neutral employers, as follows: From July 12 through August 29 it picketed Gate 3, the entrance to the terminal used by the truckdrivers of Santa Fe's customers and by the truckdrivers of Santa Fe's customers truckers; from August 10 through August 29 it picketed Gate 5, an entrance to the terminal used by Santa Fe's employees; from August 24 through August 29, it picketed Gates 2 and 4, entrances to the terminal used by Santa Fe's employees;[21] on August 24 and

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[21] I note that Respondent does not contend that the neutrality of Gate 2 was

August 25 it picketed Gate 4(b), an entrance to the terminal used by Sar,ta Fe's employees; on August 28 and August 29, it picketed the UPS drop-off point, the vacant lot used by Santa Fe's unionized customers to deliver their intermodal freight to the rail yard through Gate 3; and, from August 10 through August 29 it picketed trains operated by Santa Fe's employees at Indian Crossing, the West Switching Lead and the Zone 3 Industries spur. The aforesaid picketing, when viewed in the context of the valid reserve gate system in effect at the rail terminal during the time of the picketing, warrants the inference that Respondent engaged in the picketing with an object proscribed by Section 8(b)(4)(B) of the Act, thereby iolating Section 8(b)(9)(i)(ii)(B) of the Act.

The unlawful secondary object of Respondent's picketing herein is further demonstrated by

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breached during the picketing by the two isolated occasions on which delivery services delivered packages to Piggyback's office through that gate.

the content of the handbills which Respondent's pickets distributed at the gates reserved for the neutral employers and by the content of Respondent's August 8 letters to the unions which represent Santa Fe's employees: the handbills distributed by the pickets at Gate 3 and at the UPS drop-off point to the truckdrivers of Santa Fe's intermodal freight customers, asked them "to respect our picket line against [Piggyback]" and not to pick up and deliver intermodal freight because, as the handbill explained, in doing so they would be dealing directly with Piggyback's employees; the handbills distributed by the pickets to Santa Fe's employees at Gate 5, asked them to refuse to deliver intermodal freight to Piggyback's employees and to otherwise refuse to work with Piggyback's employees or to perform any work which would enable Piggyback's employees to perform their work; the handbills distributed by the pickets to Santa Fe's employees at Gates 2, 4 and 4(b), asked them "to refuse to deliver rail cars to Piggyback employees to work on,

refuse to work with Piggyback employees, and refuse to perform switching services to enable Piggyback employees to do their work;" and, the Respondent's August 8 letters to the unions which represent Santa Fe's employees, asked that those unions notify Santa Fe's employees that, "we are on strike and to please honor our picket lines if they come in contact with our pickets." Thus, it is 10 evident from the wording of the Respondent's August 8 letters to the unions which represent Santa Fe's employees and from the wording of the handbills which Respondent's pickets distributed at the gates reserved for the neutral employers' employees, that Respondent's intent in picketing at these gates was to attempt to enmesh the neutral employers in its dispute with Piggyback by appealing to the neutrals' employees to respect its picket line and, in the case of Santa Fe's employees, by further appealing to them to refuse to do that part of their daily work which involved Santa Fe's intermodal freight operation, if they chose to disregard

Respondent's picket line and go to work.[22]

In concluding that Respondent's picketing herein had an unlawful secondary objective, I considered that on August 27 Respondent's lawyer notified Santa Fe's lawyer that he was authorized:[23]

> to offer to place the Union's pickets inside the railyard directly adjacent to the work performed by Piggyback Services. If this offer is accepted, the Union will cease picketing at entrances to the yard used by employees who work with Piggyback Services in its day to day operations.

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[22] I did not consider the Charging Party's and the General Counsel's further contention that the unlawful secondary objective of Respondent's picketing was further demonstrated by the following factors: the way in which Respondent escalated its picketing to all of the entrances reserved for neutral employers; by the alleged testimonial admission of Picket

The belatedness of this offer,[24] the failure of the offer to include an offer to stop all picketing directed against neutrals,[25] and the Respondent's failure to show that it could not effectively accomplish its legitimate objective of communicating its dispute with Piggy-

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Captain Milo Peyovich that Respondent picketed for an unlawful secondary objective; and, by Respondent's picketing of trains which carried no intermodal freight. Whether there is merit to this contention, in whole or in part, would not affect my ultimate conclusions.

23 I note that Respondent's prior request to Santa Fe that it be allowed to enter the rail yard to picket, its request of July 30, was a request that it be allowed to picket at the east end of the rail yard in the vicinity of the safety gates to tracks 160-163, whenever Piggyback's employees opened and closed those safety gates. In making this request Respondent did not offer to discontinue its picket

ing of the neutral truckers at Gate 3, nor

back to Piggyback's employees and suppliers by picketing at the entrance reserved for Piggyback's employees and suppliers, have persuaded me that Respondent's August 27 offer was not sufficient to rebut the evidence which, I have found supra, establishes that

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did Respondent indicate it would not picket at Gate 5 or picket the trains at Indian Crossing, if its request was granted.

24 The August 27 offer was made only after Respondent had been picketing neutral employers, as follows: Gate 3, since July 12; Gate 5, since August 10, Gates 2 and 4, since August 24. Moreover, the offer was made only after Santa Fe's attorney had notified Respondent that Respondent's picketing was unlawful and that Santa Fe had filed additional unfair labor practice charges with the Board and a suit for damages caused by the picketing.

25 The August 27 offer did not include a cessation of Respondent's picketing of the neutral truckers using Gate 3 or of the Santa Fe

Respondent's picketing herein was conducted for an illegal secondary objective.26

In concluding that Respondent's picketing herein violated Section 8(b)(4)(B), I also considered whether the neutrality of Gates 2, 3, 4, 4(b) and 5 had been breached and whether the

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employees operating the trains at Indian Crossing, the West Switching Lead and the Zone 3 Industries spur, inasmuch as the offer was worded in terms of ceasing to picket "at entrances to the yard used by employees who work with Piggyback Services in its day to day operations," whereas the truckers who used Gate 3 and the Santa Fe employees who operate the trains which entered and exited the rail yard through Indian Crossing did not "work with Piggyback Services in its day to day operations," nor did the 15 picketing of the trains at Indian Crossing, the West Switching Lead and Zone 3 Industries spur involve picketing "at entrances to the yard."

26 Teamsters General Local No. 200 (Reilly Cartage), 183 NLRB 305 (1970), and similar

neutrality of the Santa Fe employees operating the picketed trains at Indian Crossing, the West Switching 15 Lead and the Zone 3 Industries spur had been compromised because Piggyback's suppliers used those gates and the picketed trains were delivering supplies to Piggyback. In resolving this issue I considered by the Board and court decisions in Elec-

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cases, differ significantly from the instant case because, among other things, they involve ambulatory picketing and because there was no showing in those cases, as in the instant case, that it would have been unsafe for the union to conduct its picketing inside of the employer's place of business. In this last regard, it is undisputed that because of the continuous movement of trains and other equipment within the rail yard, it would not have been safe for Respondent's pickets to have conducted their picketing, as requested by Respondent, in those areas of the rail yard where Piggyback's employees worked.

trical Workers Local 323 (J.H. Hoff Electric), 241 NLRB 694 (1979), enfd. sub nom. J.F. Hoff Electric v. NLRB, 642 F.2d 1266 20 (C.A.D.C.,1980), and Operating Engineers Local 450 (Linbeck Construction), 219 NLRB 997 (1976), enfd. sub nom. Linbeck Construction v. NLRB, 550 F.2d 311 (5th Cir. 1977), and Electrical Workers Local 211 (Atlantic County Authority), 277 NLRB 1041 (1985).

In Linbeck, general contractor Linbeck served as a special supplier to the primary employer, one of Linbeck's subcontractors on a construction site;

Linbeck delivered the crushed stone that Luckie used in performing its paving and sewer subcontract. Linbeck delivered the crushed stone through the Linbeck gate for Luckie's use. In holding that the union's picketing of the gate through which the general contractor provided these materials was lawful, the ', Board stated (219 NLRB at 997):

> What is important is that, in bringing in such materials, Linbeck was acting as

> a supplier of Luckie and was therefore required to use the same reserve gate as any other supplier of Luckie-that which had been 10 set aside and reserved for Luckie. By failing to do so and by delivering the materials instead through the Linbeck gate, Linbeck subjected itself to the same pressures by the Union, that the Union could use against any supplier of the primary.

The Board offered no further legal reasoning in support of this conclusion.

The court, in enforcing the Board's Linbeck decision, observed that suppliers of primary employers "occupy a middle ground in the spectrum of permissible activity under 8(b)(4)(B)": although direct appeals to them not to deliver to the primary employer are unlawful secondary activity, such suppliers are not immune from the "influence of a valid primary picket itself." 550 F.2d at 316-317. The court based this conclusion on the Supreme Court's holding that Congress intended the proviso to Section

8(b)(4)(B) to permit the traditional primary activity of picketing "'a gate reserved for employees of neutral delivery men furnishing day-to-day service essential to the [primary employer's] regular operations.'" 550 F.2d at 317, quoting Carrier Corporation, 376 U.S. at 499. The court then went on to articulate the following test for determining whether a union may picket a supplier providing materials to the primary employer at a common situs construction site: "[A]ny gate used to deliver materials essential tc the primary employer's normal operations is subject to lawful picketing." 550 F.2d at 318. Under this test, the crushed stone that the general contractor delivered to the primary employer was material essential to the primary's normal operations since the primary's subcontract required it to perform paving work, and the crushed stone was material that the primary was required to use in such work.

In Hoff Electric, the general contractor on a residential construction project, engaged

Hoff, the primary employer, to install the electrical system throughout the project. A small part of the contract between the general 40 contractor and Hoff provided for the installation of electrical fixtures. These electrical fixtures were the property of the project's owner who ordered them from Consolidated Electrical Supply Co., who regularly delivered the electrical fixtures once or twice weekly to a trailer on the jobsite. The deliveries of the fixtures to the jobsite were always made through the gate which had been reserved exclusively for the use of the employees and suppliers of the neutral employers doing business on the site. Hoff's employees picked up the fixtures at the trailer and installed them in the new buildings.

In concluding that the union's picketing of the reserved neutral gate in Hoff Electric did not violate Section 8(b)(4)(B) of the Act because the neutrality of that gate had been breached by the delivery of the electrical fixtures through that gate for Hoff's use, the

Board relied upon its decision in Linbeck as enforced by the court. 241 NLRB at 694, fn. 1. In rejecting dissenting Board Member Murphy's contention that Hoff Electric was 55 distinguishable from Linbeck because, "the supplies delivered in Linbeck through the neutral gate (crushed stone) were 'raw material,' but the material moved through the neutral gate here (electrical fixtures) is a finished product and . . . not 'material used' by Hoff in its work," the Board majority reasoned (241 NLRB at 694, fn. 1):

> As the court of appeals pointed out in enforcing the Board's order in Linbeck, "any gate used to deliver materials essential to the primary employer's normal operations is subject to lawful picketing." (Emphasis supplied by the Board.) . . . . The contention that delivery of electrical fixtures is not "essential" to the operations of an electrical contractor charged, as here, with installation of an electrical system for the

general contractor is a contention that fails of its own weight. . . . .

The court in Hoff Electric applied the Linbeck test in affirming the Board's decision, but in applying that test, the court was careful to note that "[t]his test, while based on the same principles, is not as broad as the General Electric 'work-relatedness' test developed for industrial plants where the struck employer is the owner of the plant." 642 F.2d at 1273. The court 20 also found it significant that the electrical fixtures which Consolidated Electrical supplied were used solely by the primary employer (Hoff) and no other subcontractors. Therefore, the court reasoned, "any disruption caused if the Union should be successful in its appeal to Consolidated's deliveries would not spread to anyone but the primary employer." 642 F.2d at 1275. The court also provided the following definition of "supplier": "the common sense notion of a supplier is a party which delivers goods for the direct use of the primary employer in the normal course of

its business."[27] 642 F.2d at 1274. The court also specifically noted that the materials that Consolidated supplied were to be "used and installed" by the primary employer. 642 F.2d at 1273.

In Atlantic County Authority, the Board applied the Linbeck and Hoff Electric test in holding that the union lawfully picketed the neutral gate through which the general contractor provided a standby generator for installation by the primary employer.[28] The Board observed that the primary employer's contract

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[27] The court further noted that its above definition of supplier was "a far narrower concept than the General Electric 'work-relatedness' test." 642 F.2d at 1274.

[28] The construction project's general contractor, The Atlantic County Authority, contracted with an electrical company to manufacture the standby generator and this contractor hired a trucker to deliver the generator to the project for the primary employer, an electrical contractor, to install.

obligated it to install the generator and that although only a relatively few hours were required to be expended by the primary employer to perform that part of its contract, that the generator was an indispensable integral part of the electrical system which the primary employer had contracted to install, and therefore constituted a substantial part of that contract and that the generator was supplied in order that the primary employer could pursue its normal course of business. 277 NLRB at 1044.

More recently, in Iron Workers Local 433 (Chris Crane Company), 294 NLRB No. 17, slip op. page 4 (May 24, 1989), the Board explained that in its decisions in Linbeck, Hoff Electric, and Atlantic County Authority,

> . . . we made clear that only suppliers providing materials essential to the primary employer's normal operations or solely; for the use of the primary's employees may lawfully be picketed. See, e.g., Electrical Workers 211 (Atlantic

County Authority), 277 NLRB 1041, 1044 (1985) (delivery of generator essential to primary employer's normal operation breached neutrality of gate); J.H. Hoff Electric Co. v. NLRB, 642 F.2d at 1275 (court finds it significant that supplier delivered products used only by primary). And, as articulated by the Court of Appeals for the District of Columbia in Hoff Electric, "[t]he common sense notion of a supplier is a party which delivers goods for the direct use of the primary employer in the primary course of its business." (Emphasis added.) Id. at 1274.

In the instant case Santa Fe, at its Richmond rail terminal, is in the business of, among other things, transporting intermodal freight for its customers. This freight is pre-packed by its customers in large metal containers or truck trailers, referred to collectively in this decision as vans, which are transported by Santa Fe on flatcars. Santa Fe's customers

deliver the outgoing shipments of intermodal freight to the Richmond rail terminal by truck. The customers employ either their own employees or independent truckers to haul the vans with the intermodal freight to the rail terminal. Santa Fe, rather than using its own employees to load and unload the vans onto and off of its railroad flatcars, employs an independent contractor, Piggyback, to perform this work. Pursuant to the terms of the contract between Santa Fe and Piggyback, Piggyback's employees work in the terminal's rail yard loading and unloading the intermodal freight (vans) onto and off of the flatcars. This intermodal freight is delivered to Piggyback's employees for loading and unloading in the following ways: the truckdrivers employed by Santa Fe's customers or the independent truckers employed by the customers, deliver the outgoing intermodal freight to Piggyback's employees by transporting the vans into the rail yard through Gate 3; the incoming intermodal freight is delivered to Piggyback's employees

by railroad flatcars, which must pass through Indian Crossing; and, those trains which have only a few flatcars carrying intermodal freight, and because of this are not transported directly to the area where the Piggyback employees work, but go to another area of the rail yard, are "switched" to the Piggyback employees via rail tracks at Indian Crossing, the West End Switching spur, as well as the Zone 3 Industries spur on occasion. The Santa Fe employees, who, as described above, operate the incoming trains which deliver the intermodal freight to Piggyback's employees and who, as described above, deliver the intermodal freight to Piggyback's employees by "switching" flatcars to the appropriate tracks, entered and exited the rail yard, during the time material, using Gates 4, 4(b) and 5. Lastly, with respect to Gate 2, it is undisputed that during the period of the picketing, UPS truck tractors were parked in the parking lot immediately adjacent to that gate and that several times daily during this period, supervisors of

UPS exited Gate 2 with these truck tractors and drove them to the drop-off point where they picked up and transported vans containing intermodal freight to the rail yard through Gate 3 (Tr. pages 488, 489-490).

I am persuaded that the instant case differs factually in meaningful respects from Linbeck and its progeny. Unlike the crushed stone, lighting fixtures and power generator supplied to the primary employers in those cases, the intermodal freight delivered to Piggyback was not supplied for the purpose of having Piggyback's employees "use" the freight; that is to load or unload the intermodal freight onto and off of the railroad flatcars. Rather, the outgoing intermodal freight was supplied to Piggyback's employees by the neutral truckers for Santa Fe's "use"; for Santa Fe to transport to its destination. The incoming intermodal freight was supplied to Piggyback's employees by Santa Fe's employees for Santa Fe's customers' "use"; for delivery to Santa Fe's customers by the customers' truckers.

Therefore, considering the context of the delivery of the intermodal freight to Piggyback's employees, it is clear that neither Piggyback, nor Santa Fe, nor Santa Fe's customers, nor Santa Fe's customers' truckers, considered Santa Fe's customers or Santa Fe's employees to be suppliers of Piggyback when the customers' truckers delivered the outgoing intermodal freight to the rail yard for the purpose of having Santa Fe ship it to its destination or when Santa Fe's employees delivered the incoming intermodal freight to the rail yard for the purpose of having Santa Fe deliver it to Santa Fe's customers. This is because the delivery of the intermodal freight to Piggyback's employees by Santa Fe's customers and by Santa Fe's employees does not accord with "the common sense notion of a supplier [as] a party which delivers goods for the direct use of the primary employer in the primary course of its business." Hoff Electric, supra, 642 F.2d at 1274.

I agree with the General Counsel and the

Charging Party that the common sense notion of supplies for Piggyback's operation would be cranes, tractors, oil and gas, office supplies, maintenance services and labor, and not the intermodal freight delivered to Piggyback's employees, inasmuch as that freight was not delivered to Piggyback for its employees to "use" in the performance of their duties, but was delivered so that it would be transported by employees of employers, other than Piggyback, to its ultimate destination. Moreover, I find it significant that since the intermodal freight was not for Piggyback's sole "use," but was intended to be "used" primarily by other employers, that unlike Linbeck and its progeny, the disruption caused by Respondent's picketing in this case was not confined solely to the primary employer, but was foreseeably intended to impact upon the business of neutral employers. Hoff Electric, supra, 642 F.2d at 1275. It is for all of these reasons that I am persuaded that neither the Board or the courts in Linbeck, and its progeny, meant to

extend the meaning of the term "supplier," as used in those cases, to the facts of this case.

3. The Application of the Moore Dry Dock Criteria to the Handbilling

As I have found supra, Respondent violated Section 8(b)(4)(i)(ii)(B) by picketing the entrances to Santa Fe's Richmond rail yard which had been reserved exclusively for the use of neutrals and had been designated as Gates 2, 3, 4, and 5, and further violated Section 8(b)(4)(i)(ii)(B) by picketing Gate 4(b) and the UPS drop-off point, an extension of Gate 3. As I have also found supra, in connection with and contemporaneously with this illegal picketing, the pickets distributed handbills to the employees of the neutral employers at the above-described locations. Admittedly the handbilling was part and parcel of the Respondent's picketing campaign.

The handbills distributed to the neutral truckdrivers at Gates 3 and the UPS drop-off point were addressed "To Drivers Entering this

Rail Yard" and asked them "to respect our picket line against Piggyback Services" and stated that under the truckdrivers' union contract they had a right not to do business with Piggyback, and specifically asked them not to deal with Piggyback's employees by picking up or leaving intermodal freight in the rail yard. The handbills distributed to Santa Fe's employees at Gate 5 described Respondent's labor dispute with Piggyback and asked Santa Fe's employees to refuse to deliver intermodal freight to Piggyback's employees and to otherwise refuse to work with Piggyback's employees or to do work which would enable Piggyback's employees to perform Piggyback's work. Lastly, the handbills distributed to Santa Fe's employees at Gates 2, 4, and 4(b), stated Respondent had a labor dispute with Piggyback, described the nature of the dispute, and stated, "we are asking you to refuse to deliver railcars to Piggyback employees to work on, refuse to work with Piggyback employees, and refuse to perform switching services to enable Piggy-

back employees to do their work."

Section 8(b)(4)(i)(ii)(B) of the Act, in pertinent part, makes it an unfair labor practice for a union "to induce or encourage any individual employed by any person, to engage in, a strike or a refusal . . . to . . . transport, or to otherwise handle . . . any goods, articles, materials . . . or to perform any services, or to "threaten, coerce, or restrain" any person, with an "object" of "forcing or requiring" that person to "cease doing business with any other person," unless the union is engaging in "publicity, other than picketing, for the purpose of truthfully advising the public including consumers and [union members], that a product or products are produced by an employer with whom, the [union] has a primary dispute and are distributed by another employer" and "such publicity does not have an effect of inducing any individual employed by any person other than the primary employer" to refuse to make pick-ups and deliveries or transport goods or perform services "at the establishment of the

employer engaged in such distribution."

The fact that Respondent's handbilling herein was part and parcel of Respondent's picketing campaign, which, as I have found supra, had a proscribed secondary objective, warrants the inference that the handbilling likewise had a proscribed secondary "objective" encompassed by Section 8(b)(4)(B). Moreover, as I have also found supra, the plain language used in the handbills establishes that an object of the handbilling was to force or require Santa Fe to cease doing business with Piggyback by means of inducing the employees of Santa Fe and the truckers employed by Santa Fe's customers to cease doing their assigned job duties.

Respondent's handbilling herein was not protected by the publicity proviso to Section 8(b)(4) because the handbilling succeeded in inducing the employees of neutral employers to withhold their services from their employers. As a result the handbilling cannot escape from the operation of Section 8(b)(4)(B), by virtue of the proviso exempting "publicity, other than

picketing, for the purpose of truthfully advising the public, including consumers and [union members]"; for the handbilling herein had "an effect of inducing an individual employed by [a neutral employer] to refuse . . . to perform any services . . . ." Thus, the secondary effect of the handbilling removes it from the protection of the publicity proviso to Section 8(b)(4).

The remaining issue, whether Respondent's handbilling induced or encouraged employees of neutral employers within the meaning of Section 8(b)(4)(i) and threatened, coerced or restrained neutral employers within the meaning of Section 8(b)(4)(ii), must be answered in the affirmative. The plain language contained in the handbills was reasonably calculated to induce or encourage the employees of Santa Fe and the truckers employed by Santa Fe's customers to refuse to perform their assigned work tasks. The inevitable consequence of such a refusal would be to restrain or coerce Santa Fe within the meaning of Section 8(b)(1)(ii).

Accordingly, the handbills distributed herein by Respondent's pickets induced and encouraged the employees of neutral employers within the meaning of Section 8(b)(4)(i) and restrained and coerced Santa Fe within the meaning of Section 8(b)(4)(ii) of the Act.

Having found that Respondent's handbilling at Gates 2, 3, 4, 4(b) and 5 and at the UPS drop-off point, had a secondary object proscribed by Section 8(b)(4)(B) of the Act, and was not protected by the publicity proviso to Section 8(b)(4), and that the handbilling induced and encouraged the employees of neutral employers, within the meaning of Section 8(b)(4)(i), and threatened, coerced and restrained neutral employers, within the meaning of Section 8(b)(4)(ii), I further find that by engaging in this handbilling Respondent violated Section 8(b)(4)(i)(ii)(B) of the Act.

Alternatively, I find that since Respondent's handbilling herein was part and parcel of Respondent's illegal campaign of picketing in which handbills were distributed by the pick-

ets at the entrances to the rail yard reserved exclusively for neutrals, that for this additional reason Respondent's handbilling violated Section 8(b)(4)(i)(ii)(B), because it was inextricably linked with Respondent's unlawful picketing. Cement Masons Union Local 337 (California Association of Employers), 190 NLRB 261, fn. 1 (1971); San Francisco Building and Construction Trades Council, 297 NLRB No. 177, slip op. ALJ Dec. at pages 16-17 (March 27, 1990); cf. National Association of Broadcast Employees and Technicians, AFL-CIO, Local 31, 237 NLRB 1370, 1376-1377 (1978), enfd., 631 F.2d 944, 951 (C.A.D.C.,1980).

Conclusions of Law

1. Santa Fe is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) and Section 8(b)(4) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By picketing Santa Fe's Richmond, California rail yard at Gate 3 from July 12 through

August 29, at Gate 5 from August 10 through August 29, at Gates 2 and 4 from August 24 through August 29, all of which gates were reserved exclusively for the use of neutrals; by picketing neutrals at Gate 4(b) on August 24 and August 25 and at the UPS drop-off point on August 28 and August 29; by picketing trains operated by Santa Fe's employees at the Indian Crossing, the West Switching Lead spur and the Zone 3 Industries spur from August 10 through August 29; and, by engaging in the aforesaid picketing with an object of forcing neutral employers to cease doing business with Santa Fe and of forcing Santa Fe to cease doing business with Piggyback, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i)(ii)(B) of the Act.

4. By distributing at Santa Fe's Richmond, California rail yard handbills to employees employed by neutral employers at Gate 3 from July 12 50 through August 29, at Gate 5 from August 10 through August 29, at Gates 2 and 4

from August 24 through August 29, at Gate 4(b) on August 24 and August 25, and at the UPS drop-off point on August 28 and August 29, and by engaging in this handbilling with an object of forcing neutral employers to cease doing business with Santa Fe and of forcing Santa Fe to cease doing business with Piggyback, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i)(ii)(B) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(b)(4)(i)(ii)(B) of the Act, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and

pursuant to Section 10(c) of the Act, I hereby issue the 15 following recommended:[29]

ORDER

The Respondent, General Truck Drivers, Warehousemen, Helpers and Automotive Employees of Contra Costa County, Local No. 315, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Inducing or encouraging any individual employed by Santa Fe or any other person engaged in commerce or in an industry affecting

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[29] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

commerce to engage in, a strike or refusal in the course of his employment to use, manufacture, transport, or tc otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require Santa Fe, or any person engaged in commerce or in an industry affecting commerce, to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, Piggyback.

(b) In any manner threatening, coercing, or restraining Santa Fe or any other persons engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Santa Fe, or any other person engaged in commerce to cease using, selling, handling, transporting, or otherwise dealing in the products of, or cease doing business with, Piggyback.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its office and meeting halls copies of the attached notice marked "Appen-

dix."[30] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Deliver to the Regional Director for Region 32 signed copies of the notice in sufficient number for posting by Santa Fe, if willing, at all places where notices to employees

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[30] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated: August 7, 1991

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Jerrold H. Shapiro

Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT engage in or induce or encourage any individual employed by The Atchison, Topeka and Santa Fe Railway Company, or by any other person engaged in commerce or in an industry affecting commerce to engage in, a strike or refusal in the course of his employment to use, manufacture, transport to, or to otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require The Atchison, Topeka and Santa Fe Railway Company, or any person engaged in commerce or in an industry affecting commerce, to

cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, Piggyback Services, Inc.

WE WILL NOT threaten, coerce, or restrain The Atchison, Topeka and Santa Fe Railway Company or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require The Atchison, Topeka and Santa Fe Railway Company, or any other person engaged in commerce to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, Piggyback Services Inc.

GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS AND AUTOMOTIVE EMPLOYEES OF CONTRA COSTA COUNTY, LOCAL NO. 315, affiliated with INTERNATIONAL BROTH ERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

(Labor Organization)

Dated ----- By----------

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 2201 Broadway, Second Floor, Oakland, California, 94612-3017, Telephone (415) 273-6122.

APPENDIX C

(b) [Unfair labor practices by labor organization] It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer,

or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [section 159 of this title]; *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * *

Provided, That nothing contained in this subsection (b) [this subsection] shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act [subchapter]: *Provided, further*, That for

the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

Supreme Court, U.S.
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No. 94-81

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS AND AUTOMOTIVE EMPLOYEES OF CONTRA COSTA COUNTY LOCAL NO. 315,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Atchison, Topeka and Santa Fe Railway Company, Charging Party in the proceedings before the National Labor Relations Board (N.L.R.B.) and Intervenor in proceedings before the Ninth Circuit Court of Appeals, hereby files this brief in opposition to the Petition for Writ of Certiorari herein.[1] As argued more fully below, the Court of

[1]Pursuant to Supreme Court Rule 29.1, Intervenor's parent companies consist of Santa Fe Pacific Corp. and SFP Properties, Inc.; and its subsidiary companies (which are not wholly-owned subsidiaries) consist of The Gulf and Inter-State Railway Co. of Texas, Oklahoma City

Appeals correctly held that the "related-work test" first announced in *Local 761, International Brotherhood of Electrical, Radio and Machine Workers v. N.L.R.B. (General Electric)*, 366 U.S. 667 (1961), does not apply to picketing engaged in at premises which are neither owned by nor proximate to a primary employer's premises. A contrary result would emasculate the protections afforded to neutral employers under our nation's secondary boycott laws, and would eliminate the ability of neutral employers to confine labor disputes to primary employers by means of a reserved gate system. The appellate court thus properly applied the "common situs" picketing rules to Petitioner's picketing of the gates reserved for Santa Fe Railway's employees and customers at its intermodal rail facility in Richmond, California in this instance.

The Court of Appeals' decision accordingly furthered the objectives of the Labor Management Relations Act in all respects, and correctly applied judicial and Board precedent in determining that the Petitioner violated § 8(b)(4)(B) of the Act, 29 U.S.C. § 158(b)(4)(B), in this case. Moreover, there is no conflict among the Circuits, and the Court of Appeals' decision neither conflicts with applicable decisions of this Court or decides an important question of law which has not been, but should be, decided by this Court under Supreme Court Rule 10.1(c). The Petition for Certiorari should therefore be denied.

II.

STATEMENT OF THE CASE

Following the commencement of Petitioner's unlawful picketing of gates reserved for Santa Fe Railway and its customers at Santa Fe's Richmond terminal, the Railway

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Junction Railway Co., and Rio Grande, El Paso and Santa Fe Railroad Co.

filed an unfair labor practice charge with Region 32 of the N.L.R.B. on July 13, 1990. A hearing was held before an Administrative Law Judge of the Board in March, 1991, at which evidence was presented by the parties on the unfair labor practice charge. The Administrative Law Judge thereafter rendered his decision on August 7, 1991, finding that Petitioner had violated §§ 8(b)(4)(i)(ii)(B) of the Act as alleged by General Counsel of the Board. (See Appendix B to Petition for Certiorari). The Board affirmed the Judge's findings and conclusions on March 6, 1992, in it decision reported at 306 N.L.R.B. 616.

Subsequently, the Board petitioned for enforcement of its decision, and the Union cross-petitioned for review of the Board's order, to the Ninth Circuit Court of Appeals. On April 1, 1994, the court issued its decision in this matter, entitled *N.L.R.B. v. General Truck Drivers Local No. 315,* 20 F.3d 1017 (9th Cir. 1994), in which it granted the Board's petition for enforcement and denied the Union's cross-petition for review.

III.

FACTUAL BACKGROUND

The relevant facts in this case are undisputed and are set forth at length in the Administrative Law Judge's decision, reprinted at pp. B-10 to B-55 of the Petition for Certiorari. At root, this case involves an attempt by Petitioner Teamsters Local 315 to shut down Santa Fe Railway's intermodal railroad terminal in Richmond, California in 1990, pursuant to a dispute between the Union and Piggyback Services, Inc., an intermodal freight-handling contractor at the terminal. The picketing had a substantial effect on the movement of massive amounts of goods flowing interstate commerce, including automobiles, steel, petroleum, lumber and military tanks which daily pass through the Richmond terminal. The picketing had the ultimate effect of actually shutting the

railroad terminal down for a brief period of time, until a federal district court could issue an injunction against seven separate rail unions compelling their members to go back to work and to refuse to honor the Teamsters' unlawful picket lines.

The dispute began when Piggyback Services, Inc. took over the intermodal "ramping and deramping" contract at the Richmond terminal for Santa Fe Terminal Services, Inc., which had previously been signed to an agreement with the Union. Prior to the initial appearance of pickets at the Richmond terminal, Santa Fe established a reserved gate for Piggyback Services and its employees, as well as separate reserved gates for Santa Fe's employees and the employees of the truck hauling companies which entered and exited the terminal hundreds of times daily to pick up and deliver freight for shipment on Santa Fe's rail line.

The Union began picketing the gate reserved for Santa Fe's trucking customers on July 12, 1990,[2] which caused Santa Fe and its customers to arrange for a temporary "drop-off site" near the terminal for the purpose of picking up and draying freight into the terminal. Seeking to apply greater pressure to Santa Fe in its ongoing dispute with Piggyback, the Union began picketing the east entrance to the facility, also known as "Indian Crossing," at which the trains actually entered the Richmond terminal, on August 10. The picketing at this entrance to the terminal had the effect of stopping trains entering the rail yard.[3] On the same date, the Union commenced picketing two separate railroad

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[2]All dates are 1990 unless otherwise indicated.

[3]As noted in the petition, a majority of the freight hauled into and out of the rail terminal is "non-intermodal" in nature, consisting of freight that the Piggyback Services employees did not load or unload off of rail flatcars. (See Petition, p. 4).

spurs at the west end of the terminal, which led to an industrial zone and the Port of Richmond.

The Union later escalated its picketing even further to the gates reserved for Santa Fe's employees on August 24. In honor of the picket lines established there, no Santa Fe train crews or clerical employees reported to work between August 25 and August 27, and only returned to work when an injunction was obtained against the rail unions compelling their members to go back to work under their labor agreements. (See Petition, pp. B-52 to 55). Undaunted by this occurrence, however, the Union extended its picketing one further time the very next day to a "drop-off lot" over one mile away from the terminal, at which no Piggyback employees were ever present.[4] During the course of its dispute with Piggyback, the Union also distributed handbills to Santa Fe's customers and employees asking them to refuse to perform any work inside the terminal in conjunction with Piggyback's employees. (*See* Petition, pp. A-34 to A-40).

As found by the Administrative Law Judge, the Board, and the Court of Appeals, this unlawful escalation of the union's picketing had the obvious purpose and effect of enmeshing entirely neutral parties, including Santa Fe Railway, United Parcel Service, and other Santa Fe customers, in the Union's ongoing dispute with Piggyback Services, in rank violation of § 8(b)(4)(B) of the Act. Under the facts and circumstances of this case, a clearer violation of the Act's secondary boycott prohibitions could hardly be established.

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[4]The Union's picketing program was accordingly anything but one which was engaged in with the purpose of "restricting the impact of the labor dispute to the primary employer," as Petitioner contends. (See Petition, p. 27).

IV.

LEGAL ARGUMENT

Petitioner seeks to shield its unlawful secondary conduct in this case by arguing that the "related-work test" set forth in the Supreme Court's decision in *General Electric* should be applied to common work situses owned or controlled by neutral employers. More specifically, Petitioner contends that the law should be changed to make all persons who perform work "necessary to the normal operations of the primary employer" at such sites legitimate objects of union picketing. This contention is both patently contrary to well-established decisional law and antithetical of the overriding purposes of the statute.

Section 8(b)(4)(B) of the Act generally makes it unlawful to induce or encourage any individual employed by any person engaged in commerce, or to threaten, coerce, or restrain any person engaged in commerce, where in either case an object thereof is to force or require any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer or to cease doing business with any other person. This statutory scheme makes unlawful secondary boycotts whose "sanctions bear not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it." *Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO (General Electric Co.) v. N.L.R.B.*, 366 U.S. 667, 672, 81 S.Ct. 1283, 6 L.Ed.2d 592 (1961) (hereinafter *"General Electric"*). The Act is thus violated when the conduct engaged in by the union is addressed "not to the labor relations of the primary employer vis-a-vis his own employees, but is tactically calculated to satisfy union objectives elsewhere." *National Woodwork Manufacturers Assoc. v. N.L.R.B.*, 386 U.S. 612, 644, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967).

In *General Electric*, 366 U.S. 667, 680, the Supreme Court considered the legality of a union's picketing of separate gates reserved for certain maintenance contractors at a struck employer's plant. The Court held that if the work performed by the contractors was related to the "normal operations of the struck employer," and was of the kind that would necessitate curtailing those operations, such contractors could be lawfully picketed at the struck G.E. plant. *Id.* at 681-2. In fashioning this test, the Court did not address whether the "related-work" test would apply to picketing occurring at a common situs occupied by a neutral employer when the primary employer performed services related to the neutral site owner's operations. In fact, the Supreme Court noted with approval language contained in the Board's decision in *Retail Fruit and Vegetable Clerks (Crystal Palace Market)*, 116 NLRB 856, 860, fn. 10 (1956), in which the Board stated that "more latitude [should] be given to picketing at . . . separate primary premises than at premises occupied in part (or entirely) by secondary employers." See *General Electric*, 366 U.S. at 679.

Both the N.L.R.B. and the courts subsequently acknowledged that the Supreme Court in the *General Electric* case had addressed only picketing conducted at a struck plant itself, and that it did not attempt to formulate any rules for determining the legality of picketing away from a struck facility operated by the primary employer. *See Kinty v. United Mine Workers of America*, 544 F.2d 706, 714-5 (4th Cir. 1976); *National Maritime Union v. N.L.R.B.*, 367 F.2d 171, 178 (8th Cir. 1986). The Board thus stated long ago that:

> Over the years, the distinction between common situs picketing and that which occurs at premises occupied solely by the struck employer has been a guiding consideration in Board efforts to strike a balance between the competing interests underlying the boy-

> cott provisions of the Act. Mindful of the fact that "Congress did not seek, by § 8(b)(4), to interfere with the primary strike," the Board has given wide latitude to picketing and related conduct confined to the sole premises of the primary employer. On the other hand, in the interest of shielding "unoffending employers" from disputes not their own, the Board has taken a more restrictive view of common situs picketing, requiring that it be conducted so as "to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees."

Building and Construction Trades Council of New Orleans (Markwell and Hartz, Inc.), 155 NLRB 319, 324 (1965), *enf'd.*, 387 F.2d 79, 83-84 (5th Cir. 1967).[5] Petitioner's contention that ownership or control of the premises involved in common situs labor disputes "is not an important component in analysis for purpose of § 8(b)(4)(B) of the Act" is therefore devoid of any support whatsoever and is directly contrary to long-established precedent.

In fact, authority cited in Petitioner's brief readily supports this distinction. In *Seafarers International Union v. N.L.R.B.*, 265 F.2d 585 (D.C. Cir. 1959), the court was confronted with the legality of a union's picketing of a ship being repaired at a neutral employer's repair yard, pursuant to a labor dispute between the union and an oil drilling operator which leased the ship. Finding that the oil drilling company was engaged in its normal business operations in overhauling and repairing the ship at the repair yard, and that the ship actually constituted the "situs of the primary

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[5]Moreover, at least one federal district court adopted the Board's rationale in this case, in enjoining a union's picketing at a rail yard under virtually identical circumstances. *See Calatrello v. Teamsters Local 407*, 141 LRRM (BNA) 2778, 2782 (N.D. Ohio 1992).

dispute," the union's picketing at the ship yard was found lawful, under circumstances in which no reserved gates were established. In so holding, the court of appeals stated that:

> No matter how great the pressure on a neutral employer may be when somebody else's place of business is picketed, it is essentially different from the pressure such a neutral feels when his own business is being picketed. This difference in pressure, between that which occurs, somewhat indirectly, when another employer's premises are picketed and that which occurs when a neutral employer's own premises are picketed, is the rationale which must govern the interpretation of § 8(b)(4).

Id. at 591. The court therefore clearly recognized the distinctive interests which are involved when picketing occurs at a primary as opposed to secondary employer's premises, as did the Ninth Circuit Court of Appeals in this case.

Strangely, Petitioner also seeks to rely on the Board's decision in *Sailor's Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950), the very case which established the "common situs" picketing rules which govern this case. In that case, the Board did in fact find that a union's picketing at the entrance to the main gate of a ship repair yard to be lawful, when the primary employer's ship was in the process of being readied for sail within the yard. However, in direct contrast to the instant case, there were no reserved gates established for use of the employees of the primary employer, and for those of neutral employers, working at the site. Of course, it is by instituting such a reserved gate system that neutral employers have historically been able to confine the union's picketing of the primary employer at places "reasonably close to the situs," in accordance with the *Moore Dry Dock* rules. *See J.F. Hoff Elec. Co. v. N.L.R.B.*, 642 F.2d 1266, 1270 (D.C. Cir. 1980), *cert. den.* 451 U.S. 918, 101 S.Ct. 1997, 68 L.Ed.2d 310 (1981).

The reasons for applying different rules to picketing engaged in at primary employer's premises, as opposed to those of a secondary employer, are based on both common sense and the salutary purposes of the secondary boycott law. A primary site owner such as General Electric can more easily assume the risks of the effects that the picketing will have on its business operations, and can even shut down or lock out its employees in an ongoing labor dispute. The primary site owner thus has control over the course of labor dispute at all times, and is always able to resolve it by simply agreeing with the union's demands. The secondary site owner, however, has no control over the resolution of the labor dispute, and does not voluntarily assume the risks of picketing which deleteriously affects its business enterprise. In such circumstances, the secondary site owner thus clearly retains the status of a "neutral" employer under the Act, which is entitled to protection from union pressures "designed to involve them in disputes not their own." *National Woodwork Mfrs. Assoc., supra,* 386 U.S. at 625-6.

Indeed, if Petitioner's position were correct, and the *General Electric* "related-work test" was in fact applied to common work situses based merely on a determination that the neutral employer's operations were "essential" to a primary employer's operations, absurd and extremely undesirable results would follow, particularly in cases such as this one in which a service contractor performs one function in a large integrated common situs operation. Thus, under the Union's test, it would be entitled to picket, notwithstanding the establishment of valid reserve gates:

(1) all of the entrances to an airport, including those set aside for pilots, flight attendants and the traveling public, in the event the union had a dispute with a food service contractor which prepared and transported meals to the airplanes;

(2) all of the entrances leading into a bus depot, including those set aside for drivers, concessionaires, ticket agents, and passengers, pursuant to a dispute the union had with a ground service contractor responsible for loading and unloading baggage at the terminal;

(3) every entrance leading into a school, including those reserved for students, teachers, and other school employees, pursuant to a dispute it was engaged in with the maintenance contractor at the school;[6] and

(4) the main entrance to a naval supply center used by U.S. Navy personnel, pursuant to a dispute it was engaged in with a trucking company which contracted to stuff and dray seagoing containers.[7]

In each of the above cases, the operations of the larger secondary site owners are obviously "necessary" to the "essential operations" of the primary employer; indeed, without the existence of the neutral site owners and their customers, there would obviously be no need for these various service contractors to even be present or doing business at the common situs. However, each of these site owners is manifestly and without question entitled to the protections afforded them by the establishment of a reserved gate system under § 8(b)(4) of the Act under well-established law. As the court below expressly found, the Union's argument in this case would therefore "render the statute

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[6]These were the facts of *Local 32B-32J Service Employees International Union (The Dalton Schools)*, 248 NLRB 1067, 1069 (1980), in which the Board rejected the union's attempt to apply the *General Electric* doctrine to the common situs owned by the school as "patently without merit" and as an attempt to "grossly distort the purposes" of the Supreme Court's decision in that case.

[7]Such were the facts of *Teamsters Local 70 (U.S. Department of Navy)*, 261 NLRB 496, 500-1 (1982), in which the Board found a violation of § 8(b)(4)(B).

powerless to protect against conduct Congress clearly intended to prohibit," and would eliminate the protections afforded neutral employers under the Act. *N.L.R.B. v. General Truck Drivers, supra,* 20 F.3d at 1023-4, citing *Kinty, supra,* 544 F.2d at 715.

Petitioner also heavily relies on the close working relationship between the Santa Fe Railway and Piggyback Services employees in arguing for an extension of the *General Electric* "related-work" test to this case. However, it is precisely because of the close working relationship and necessary interdependence between contractors in the construction industry that the Board and the courts have refused to apply the related-work test to that industry, as to do so would operate to deny truly neutral employers the statutory protections of § 8(b)(4) and seriously impede commerce thereby. *N.L.R.B. v. Denver Building Trades Council,* 341 U.S. 675, 689-90, 71 S.Ct. 943, 95 L.Ed. 1284 (1951); *Ironworkers Local 433 (Chris Crane Co).,* 294 NLRB 182, 183 (1989), *enf'd.* 883 F.2d 1024 (9th Cir. 1980). Very similar policy concerns exist in the instant case, and preclude the application of the "related-work" test to rail freight terminals and other centers of interstate commerce at which some interdependence between a transportation carrier and independent contractors is always necessary for the proper functioning of the common situs.

Moreover, and contrary to Petitioner's assertions, the Board and the courts have not merely rejected the application of the "related work" test to the construction industry setting. In *National Maritime Union (Farmers Union Grain Terminal Association),* 152 NLRB 1447, 1458-9 (1965), *enf'd* 367 F.2d 171, 177-8 (8th Cir. 1966), the Board reviewed the legality of a union's picketing of various companies which cleaned, repaired, loaded, and towed barges which were transported on a waterway by a struck barge towing company. Finding that the towing company was

"neither the original nor final transporter," but only serviced "a portion of the total tow," the Board found the picketing of neutral employers who delivered and received the freight towed by the towing company to be unlawful. The Board and Court of Appeals expressly rejected the union's appeal for application of the "related work test" in that case, analogizing the primary employer's business to interlining operations performed by truckers which are protected from secondary pressures under the Act. Similarly, in this case, Piggyback serviced only "one portion of the total tow" of the intermodal freight, thereby analogously rendering both the deliverers and ultimate transporters of the rail freight neutral employers who were legally insulated from the Union's picketing under § 8(b)(4).

To accept Respondent's contention would therefore effectively repeal § 8(b)(4) of the Act as applied to Santa Fe's rail operation and the business of its intermodal customers in this case. Under the foregoing authorities, the mere fact that Santa Fe either delivered freight to, or received freight from, Piggyback Services did not destroy its status as a neutral employer or compromise its ability to protect itself against picketing at its rail terminal under the *Moore Dry Dock* "common situs picketing" rules. Furthermore, to sanction the Union's picketing at the Richmond terminal in this instance would permit a labor dispute to be extended to all neutral employers in a chain of transit merely because they are intermediaries of goods handled by a struck employer — a result clearly repugnant to the purposes of the statute. The Board and Court of Appeals therefore properly found that Petitioner's picketing of the Santa Fe employee gates, the Indian Crossing entrance, the railroad spurs, and the "drop-off site" unlawfully induced neutral employees to refuse to perform their work, and unlawfully coerced and restrained Santa Fe with the intent to enmesh Santa Fe in the Union's dispute with Piggyback, in violation of § 8(b)(4)(i)(ii)(B) of the Act.

Finally, Petitioner contends, without citing any authority, that "there is no justifiable distinction" between suppliers to a primary employer at a common situs and employers whose operations are "essential to the normal operations of the primary employer." This argument ignores forty-seven years of precedent under the Taft-Hartley Act, in which the Board and courts have consistently held that "suppliers" who deliver goods for the direct use of a primary employer at a common situs are legitimate objects of union picketing, but that those who merely perform "related work" at the site are not. *J. F. Hoff Electric Co. v. N.L.R.B., supra,* 642 F.2d at 1273-4. This rule is entirely consistent with the Congress' intent, which was to prohibit unions from engaging in secondary conduct against third persons who are not in "cahoots with" the primary employer. 94 Congressional Record 8709 (1947).

By way of illustration, unionized teachers could not be the legitimate targets of a union's picketing pursuant to its dispute with the maintenance contractor at a school such as occurred in *Dalton Schools, supra,* merely because the teachers created refuse and thereby produced "related work" for the janitors. Rather, the only lawful targets of such picketing (other than the contractor) would be the actual suppliers of janitorial equipment and supplies, who could be required to use a gate reserved for the picketed maintenance contractor at the common situs. This rule furthers the law's intent that those companies who make voluntary and conscious choices to aid a struck employer, for their own economic gain, be required to cross a picket line in order to continue doing business with the primary employer at a common situs, but that other employers on the site retain their status as neutrals and their right to remain insulated from the coercive effects of the union's

picketing.[1] There is accordingly no reason whatsoever to revisit this well established demarcation line between primary and secondary activity at this time.

This Court held over forty years ago, in *Denver Building Trades, supra,* that the relationship between independent contractors "doing business" with one another does not "make the employees of one the employees of the other" or otherwise legitimize the picketing of a contractor, such as Santa Fe, pursuant to a labor dispute between a union and its subcontractor, such as Piggyback Services. *Ibid.,* 341 U.S. at 689-90. There is no logical, just, nor principled reason for reversing this long-standing authority, and to do so would open a Pandora's Box of secondary activity which would directly contravene the well-defined purpose and intent of the secondary boycott laws.

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[1]Both the Board and Court of Appeals found that neither Santa Fe nor its customers were "suppliers" of Piggyback Services in this case, and Petitioner herein does not so contend. (See Petition, pp. A-32 to A-34.)

V.

CONCLUSION

For all of the foregoing reasons, this petition raises issues which have been settled by this Court for the past four decades, and should therefore be summarily denied.

Dated: August 3, 1994

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1994

GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS & AUTOMOTIVE EMPLOYEES OF CONTRA COSTA COUNTY, LOCAL NO. 315, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld the National Labor Relations Board's determination that petitioner engaged in secondary activity violative of Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(B), by picketing and handbilling a neutral employer's rail terminal at locations other than the gate reserved exclusively for the use of the primary employer to the labor dispute.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-81

GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS & AUTOMOTIVE EMPLOYEES OF CONTRA COSTA COUNTY, LOCAL NO. 315, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A41) is reported at 20 F.3d 1017. The decision and order of the National Labor Relations Board (Pet. App. B1-B5), including the decision of the administrative law judge (Pet. App. B6-B115), is reported at 306 N.L.R.B. 616.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1994. The petition for a writ of certiorari was

filed on June 30, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) operates a rail terminal in Richmond, California. Pet. App. B10. Approximately 40 percent of the rail traffic at the Richmond terminal consists of "intermodal" freight, which is transported in trailers and containers (collectively referred to as vans) on flatcars. *Id.* at B11. The process of lifting vans onto and off of railroad flatcars at the terminal is referred to as "ramping" and "deramping" of intermodal freight. For some time, that process was performed by Santa Fe Terminal Services, Inc., a wholly owned subsidiary of Santa Fe, whose employees were represented by petitioner. Effective July 1, 1990, however, Santa Fe subcontracted the ramping and deramping work to Piggyback Services, Inc. (Piggyback). Under the subcontract, Piggyback performed those services for Santa Fe on a fee-per-lift basis, using heavy equipment furnished by Santa Fe. Petitioner did not dispute Santa Fe's right to subcontract the ramping and deramping operation to Piggyback, but believed that Piggyback had breached a promise to hire Santa Fe Terminal Services, Inc., employees to perform that work. *Id.* at B15-B16, B23-B24.

Piggyback performed ramping and deramping services for Santa Fe in an area on the north side of the rail yard known as the "intermodal" or "ramp" area. Pet. App. B12. All incoming and outgoing rail traffic, approximately 60 trains daily, used a single "main line" track at the east end of the terminal. *Id.* at B11, B12. Trucks of Santa Fe's customers, used to haul approximately 600 vans to and from the terminal daily, entered and exited

the rail yard at an entrance along the southern boundary. *Id.* at B14-B15. Santa Fe's employees and its customers' truckers worked with Piggyback's employees in handling of intermodal freight. Santa Fe's assistant train masters gave Piggyback's coordinators information about track assignments and location of flatcars, while Santa Fe employees worked with Piggyback employees to switch railroad cars into and out of the intermodal area of the terminal. *Id.* at B20, B21. At the checkpoint at which all truckers entering or exiting the rail yard were required to stop, Piggyback employees inspected all vans for damage and gave the truckers information. *Id.* at B16-B18. With the exception of the ramping and deramping service provided by Piggyback, Santa Fe's workforce of approximately 200 employees performed all of the work required to operate the terminal.[1] *Id.* at B10.

2. From July 2 until August 29, 1990, when petitioner settled its dispute with Piggyback, petitioner picketed and distributed handbills at the Santa Fe terminal to protest Piggyback's refusal to hire petitioner's members.

a. Beginning on July 2 and continuing throughout the period of the dispute, petitioner picketed at Gate 1, which provided general access to the terminal. The picketers carried signs that read: "PIGGYBACK SERVICES LOCK OUT UNFAIR TO TEAMSTERS LOCAL 315." Pet. App. B14, B24-B25. Before the picketing began at Gate 1, Santa Fe had posted a sign there, stating that Gate 1 was reserved exclusively for the use of

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[1] Those employees included engineers, switching crews, mechanical employees, track maintenance employees, and clerical employees, represented by seven different railroad craft unions. Pet. App. B10.

Piggyback's employees, visitors, customers, and suppliers, and that Santa Fe's employees, visitors, customers, and suppliers were to enter the terminal through Gates 2 and 3. *Id.* at B24. Piggyback's employees crossed the picket line at Gate 1, and Santa Fe's employees used other gates and continued working. Gov't C.A. Br. 10; Tr. 455, 553.

b. Beginning on July 12 and continuing until August 29, petitioner expanded its picketing to include Gate 3, the entrance used by all truck drivers hauling intermodal freight to and from the terminal for Santa Fe's customers.[2] Pet. App. B16, B25, B26. Before that picketing began, Santa Fe had posted a sign at Gate 3, stating that it was reserved exclusively for the use of its employees, visitors, customers, and suppliers, and that Piggyback's employees, visitors, customers, and suppliers were to enter the terminal through Gate 1. *Id.* at B25. In addition to carrying signs, picketers at Gate 3 distributed handbills to the truck drivers entering the terminal, which read, in pertinent part: "[Petitioner] is asking you to respect our picket line against [Piggyback]. If you are here to pick up or drop a trailer, you will be dealing directly with employees of [Piggyback]. We are asking you not to do that." *Id.* at B25-B26. Unionized truck drivers, including drivers employed by United Parcel Service (UPS), Santa Fe's largest intermodal freight customer at the terminal accounting for 25 percent of Santa Fe's intermodal freight business there, *id.* at B26 n.3, refused to cross the picket line at Gate 3. To maintain the flow of inter-

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[2] Trucks picking up and delivering intermodal freight at the terminal were owned and operated by Santa Fe's customers. Pet. App. B16. Neither Santa Fe's customers nor the independent truckers had any contractual relationship with Piggyback. *Ibid.*

modal freight, Santa Fe established a drop-off location on a public street near Gate 3,[3] and arranged for other trucking companies to transport its customers' freight between the drop-off location and the terminal.[4] *Id.* at B28.

c. Santa Fe's employees continued to report for work. On August 8, petitioner sent identical letters to the presidents of the seven unions representing Santa Fe's employees (see note 1, *supra*), requesting them to "notify your Santa Fe Railroad members * * * that each person has the right to honor a picket line without jeopardizing their jobs." Pet. App. B35. Petitioner's letter sought the unions' "assistance and cooperation in informing your members * * * to please honor our picket line if they come in contact with our picketers." *Id.* at B36.

d. On August 10 and continuing until August 29, petitioner extended its picketing and handbilling activities to Gate 5, the entrance to the terminal near a point known as Indian Crossing, where the single track used by all incoming and outgoing rail traffic intersects a roadway a few hundred yards from the east end of the terminal. Pet. App. B11, B28-B29. Santa Fe had posted a sign at Gate 5 reserving it exclusively for the use of its employees, visitors, customers, and suppliers, and directing Piggyback's employees, visitors, customers, and suppliers to use Gate 1. *Id.* at B25. In addition to carrying signs, picketers at Gate 5 distributed a handbill addressed "TO EMPLOYEES WORKING IN SANTA

[3] On August 14, Santa Fe moved the drop-off site to a vacant lot about one and one-half miles from the terminal. Pet. App. B51.

[4] UPS transported its own freight between the terminal and the drop-off point by assigning supervisors to drive the trucks. Pet. App. B28.

FE RAILWAY YARD." The handbill requested Santa Fe employees "to refuse to deliver railcars to Piggy Back employees to work on, refuse to work with Piggy Back employees, and refuse to perform switching services to enable Piggy Back employees to do their work." The handbill also stated that petitioner was "not asking you to cease any work unrelated to Piggy Back's day-to-day operations." *Id.* at B29.

On August 10, picketers at Gate 5 began a practice of gathering near the track at Indian Crossing to hold up or wave their signs when trains carrying one or more flatcars of intermodal freight approached the terminal. Pet. App. B38. On the same date, picketers stationed at Gate 1 began to picket in the same manner around such trains on two spur tracks at the west end of the terminal. *Id.* at B44. Santa Fe's train crews frequently stopped their trains when they encountered picketers. When that occurred, Santa Fe's supervisors replaced the crews and brought the trains through the picket lines. Gov't C.A. Br. 12; Tr. 207-209, 503.

e. On August 24 and continuing until August 29, petitioner extended its picketing and handbilling to Gate 2, which provided access to an office building occupied by Santa Fe and Piggyback, and to Gates 4 and 4(b), adjacent entrances to the rail yard.[5] Pet. App. B14, B15, B48 & n.14. Santa Fe had posted signs at Gates 2 and 4 reserving them exclusively for the use of its employees. The handbill petitioner distributed at Gates 2 and 4 was in all relevant respects identical to the handbill it was distributing at Gate 5. *Id.* at B25, B49.

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[5] Santa Fe opened Gate 4(b) on August 24, but did not reserve it for the exclusive use of its employees, visitors, customers, and suppliers, as it had Gates 2, 3, 4, and 5. Santa Fe closed Gate 4(b) on August 25. Pet. App. B48 n.14.

Beginning on the evening of August 24, Santa Fe's employees refused to cross petitioner's picket lines at Gates 2, 4, 4(b), and 5. Santa Fe continued to operate the terminal by using supervisory personnel. Pet. App. B52-B53. On the evening of August 27, Santa Fe's employees returned to work, pursuant to a court order. *Id.* at B54-B55. The following evening, August 28, petitioner began to picket at the drop-off site Santa Fe had established for UPS and its other intermodal freight customers (see page 5, *supra*) and to distribute handbills there identical to the handbills it was distributing at Gate 3. *Id.* at B52.

3. The General Counsel of the National Labor Relations Board (Board) issued a complaint against petitioner alleging that the picketing and handbilling detailed above, other than that at Gate 1, violated Section 8(b)(4)(i)(B) and (ii)(B) of the National Labor Relations Act (Act),[6] because an object of the picketing and handbilling was to force Santa Fe and other neutral employers to cease doing business with Piggyback. Pet. App. B55. After a hearing, an administrative law judge (ALJ) concluded that petitioner's picketing other than

[6] Section 8(b)(4) of the Act, 29 U.S.C. 158(b)(4), provides, in relevant part, that it shall be an unfair labor practice for a union:

> (i) to engage in, or to induce or encourage any individual employed by any person * * * to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person * * * where in either case an object thereof is * * * (B) forcing or requiring any person * * * to cease doing business with any other person * * *: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

that at Gate 1 and its handbilling were unlawful under Section 8(b)(4)(B). Pet. App. B106-B108.

The ALJ applied the criteria for evaluating the lawfulness of common-situs picketing set forth in *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547, 549 (1950): (1) whether the picketing is strictly "limited to times when the situs of dispute [i]s located on the secondary [employer's] premises"; (2) whether "the primary employer [is] engaged in [its] normal business at the situs"; (3) whether the picketing "take[s] place reasonably close to the situs"; and (4) whether the picketing "clearly disclose[s] that the dispute [i]s only with the primary employer." Pet. App. B61-B62 (quoting *Local 761, Int'l Union of Electrical Workers* v. *NLRB*, 366 U.S. 667, 677 (1961) (*General Electric*)). The ALJ observed that a neutral employer may establish a separate gate for the exclusive use of the employees of the primary employer to a labor dispute, and that, when the neutral employer has done so, "the union, as part of its obligation to minimize the secondary effects of common situs picketing, must * * * avoid extending its appeal to those jobsite access points used only by neutral employers and their employees." *Id.* at B75-B76. Under *Moore Dry Dock*, the ALJ explained, "picketing that extends beyond the gate established for the primary employer and its employees and suppliers * * * creates the inference that the union is pursuing unlawful, secondary objectives." *Id.* at B76.

The ALJ found that an inference of secondary objectives was warranted here, because petitioner, although fully aware of Santa Fe's reserved gate system, nevertheless extended its picketing well beyond Gate 1 to include access points to the terminal used exclusively by employees of Santa Fe and its customers, which were neutral to the dispute between petitioner and Piggyback.

Pet. App. B76-B78. The ALJ also found that petitioner's August 8 letter to the presidents of the seven unions that represented Santa Fe's employees, and the handbills petitioner distributed at the reserved gates, further demonstrated that its picketing had an unlawful secondary object. *Id.* at B78-B81. Finally, the ALJ found that petitioner's handbilling was also unlawful because it was "inextricably linked" with the unlawful picketing campaign and, alternatively, because the handbilling itself had an unlawful secondary objective. *Id.* at B105-B106.

The ALJ rejected petitioner's contention that the lawfulness of its picketing should have been evaluated, not under the *Moore Dry Dock* criteria, but under the "related work" principle articulated in *General Electric* and *United Steelworkers of America* v. *NLRB*, 376 U.S. 492 (1964) (*Carrier Corp.*). Pet. App. B55-B56, B74-B75. The ALJ explained that "whether the work of Santa Fe or the other neutral employers doing business with Santa Fe was 'related' to the normal operations of Piggyback" was not relevant to the lawfulness of petitioner's picketing, because "the applicability of the 'related work' principle depends on whether the picketing takes place at the primary employer's premises, whereas here it took place at the premises of the neutral employer." *Id.* at B74-B75.

The ALJ also rejected petitioner's contention that its picketing was lawful because Santa Fe and its customers were "suppliers" of Piggyback. Pet. App. B98-B100. The ALJ recognized that, under Board law, a union may picket a gate at a common situs used by the primary employer's suppliers. *Id.* at B86-B94. The ALJ explained, however, that in this case petitioner's picketing was "foreseeably intended" to have an impact on the business of neutral employers, because the intermodal freight was

not used only by Piggyback, but was used primarily by other employers. *Id.* at B99.

The Board affirmed the ALJ's findings and conclusions, and, with a minor modification not relevant here, adopted the cease-and-desist order recommended by the ALJ. Pet. App. B1-B5.

4. The court of appeals enforced the Board's order. Pet. App. A1-A41. The court, in agreement with the Board, held that the lawfulness of petitioner's conduct was governed by *Moore Dry Dock* rather than the "related work" rule of *General Electric* and *Carrier Corp.* *Id.* at A20. The court observed that it could "conceive of no principled basis for expanding the standards of *General Electric* and *Carrier* to encompass the situation presented here, i.e., picketing at sites on the premises of a neutral employer, which sites are not reasonably proximate to the struck facility." *Id.* at A27. The court explained that, if adopted, petitioner's submission—that the "interdependency" between the operations of Piggyback and Santa Fe justified its appeal to neutral employees and customers of Santa Fe—"would eviscerate the intent of Congress to shield neutral employers from labor disputes that are not their own." *Id.* at A20-A21, A27. The court of appeals also deemed "amply supported by the record" the Board's finding that Santa Fe and its customers were not "suppliers" of Piggyback. *Id.* at A34. Finally, the court held that substantial evidence supported the Board's conclusion that petitioner's picketing, considered in light of its handbilling, violated Section 8(b)(4)(B). *Id.* at A40-A41.

ARGUMENT

1. Petitioner contends (Pet. 17-22) that the lawfulness of its picketing should have been evaluated under the principles announced in this Court's decision in *General*

Electric rather than under the Board's *Moore Dry Dock* test. According to petitioner, *General Electric*'s approach is not confined to picketing at a situs owned by the employer with which the union has a primary dispute. Petitioner also argues that, judged under the *General Electric* standard, its picketing was lawful. Neither contention is correct.

a. In *General Electric*, the union picketed the premises of the company with which it had a labor dispute at two locations: a gate used by the primary employer, and a gate reserved exclusively for independent contractors and their employees who were regularly working on those premises. The Court approved the Board's application of the *Moore Dry Dock* standards to the latter picketing insofar as the work done at the primary employer's premises by the secondary employers was "unconnected to the normal operations of the struck employer." 366 U.S. at 680. In those circumstances, the Court held, the primary employer may erect a gate and direct that the secondary employers enter the primary employer's premises only through that gate; and, if the union pickets at the reserved gate, the Board may find that the union has failed to confine its picketing as close as possible to the situs of the primary employer's operations. On the other hand, the Court held, if employees of the secondary employer are performing "work necessary to the normal operations" of the primary employer, *id.* at 682, the union may picket the secondary employer at any gate used by it and its employees. *Id.* at 680-681.

Petitioner contends (Pet. 20) that "the truck drivers bringing vans to Piggyback, and the Santa Fe employees working directly with Piggyback at the job situs were performing 'work necessary to the normal operations' of Piggyback." Accordingly, petitioner suggests that,

under *General Electric*, petitioner was not required to confine its picketing and handbilling activity to the gate reserved for Piggyback and its employees and suppliers, and that the Board erred in inferring a secondary objective based on the third *Moore Dry Dock* factor: that, to qualify as lawful primary activity, "the picketing take place reasonably close to the situs" of the primary dispute. See Pet. App. B2, B62, B75-B78.

General Electric, however, is inapplicable to picketing of a situs where the union's primary dispute is not with the employer operating the plant or other business on the premises, but with an independent contractor that the employer has engaged to perform work for it. In *General Electric*, the Court made clear that the issue before it was "whether the Board may apply the [*Moore*] *Dry Dock* criteria so as to make unlawful picketing at a gate utilized exclusively by employees of independent contractors who work *on the struck employer's premises*." 366 U.S. at 680 (emphasis added). Only in the limited context of picketing at the primary employer's premises did the Court hold that "if the duties of those [neutral] employees [are] connected with the normal operations of the [struck] employer, picketing directed at them [is] protected primary activity, but if their work [is] unrelated to the day-to-day operation of the [struck] employer's plant, the picketing [is] an unfair labor practice." *Carrier Corp.*, 376 U.S. at 497-498 (explaining the *General Electric* decision).[7]

[7] In *Carrier Corp.*, the Court applied the *General Electric* rule to picketing at the rail entrance gate to Carrier's struck plant that was located on a right of way owned by the railroad that supplied Carrier with services related to its daily operations. While that picketing was technically off of the primary employer's premises, the Court found *General Electric* applicable, because the fence surrounding the railroad's property was a continuation of the

To apply the *General Electric* related-work rule to the context here would permit a union to "enmesh all customers of * * * contractors" in disputes between the union and the primary employer. *Local 32B-32J, Service Employees Int'l Union (The Dalton Schools)*, 248 N.L.R.B. 1067, 1069 (1980). There is always likely to be some "similarity or relatedness in the work of the primary struck *supplier* and a portion of the work done by its *customer*." *Ibid.* Thus, petitioner's approach would unreasonably allow the expansion of primary disputes to neutral employers. Moreover, if *General Electric*'s related-work rule were applied to picketing at the premises of employers served by independent contractors with which the union has a dispute, it would effectively nullify the Court's holding in *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 689-690 (1951). In that case, the Court held that, notwithstanding the close relationship between the general contractor and the various subcontractors on a construction project, each was a neutral in a labor dispute involving the other and was thus entitled to the protection of the Act's secondary boycott provisions. Accord *International Bhd. of Electrical Workers* v. *NLRB*, 341 U.S. 694, 699-700 (1951). Although petitioner asserts (Pet. 25 n.4) that the relationship between Piggyback and the neutral employers here differs from the relationship between the various contractors on a construction site, it offers no principled basis for distinguishing the two situations.

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fence surrounding the Carrier plant, and there was no other place where the union could have brought home to the railroad workers servicing Carrier its dispute with Carrier. 376 U.S. at 500. In light of the establishment of Gate 1 for Piggyback's use, those considerations are not present here.

In light of those considerations, the Board reasonably has concluded that, where, as here, the primary employer is working not on its own premises, but on the premises of a neutral employer or one shared in common by a number of neutral employers, the union's right to engage in lawful primary activity is sufficiently protected by permitting it to picket only reasonably close to the location of the situs of the primary dispute. In this case, that location was Gate 1, the gate reserved for Piggyback and its employees and suppliers. In similar situations, the courts of appeals have uniformly held that the lawfulness of the union's picketing is to be determined under the *Moore Dry Dock* criteria, not the *General Electric* rule. See *Kinty* v. *United Mine Workers*, 544 F.2d 706, 713-715 (4th Cir. 1976), cert. denied, 429 U.S. 1093 (1977); *International Ass'n of Iron Workers Local 433* v. *NLRB*, 598 F.2d 1154, 1156 n.3 (9th Cir. 1979); *Building & Construction Trades Council of New Orleans (Markwell & Hartz, Inc.)*, 155 N.L.R.B. 319, 325-326 (1965), enforced, 387 F.2d 79 (5th Cir. 1967), cert. denied, 391 U.S. 914 (1968).[8]

b. Even if *General Electric* were found applicable here, petitioner's conduct would not be lawful primary picketing. Petitioner's appeals to Santa Fe's employees and those of other neutral employers were not confined to the narrow purpose of persuading them to refuse to work with Piggyback's employees. Rather, the ALJ

[8] In *Seafarers Int'l Union* v. *NLRB*, 265 F.2d 585 (D.C. Cir. 1959), a case cited by petitioner (Pet. 23 n.3) that was decided before *General Electric*, the court emphasized a similar distinction, observing that "[the] difference in pressure, between that which occurs, somewhat indirectly, when another employer's premises are picketed and that which occurs when a neutral employer's own premises are picketed, is the rationale which must govern the interpretation of Section 8(b)(4)." 265 F.2d at 591.

specifically found that petitioner's objective in picketing and handbilling at the gates other than Gate 1 was "to attempt to enmesh the neutral employers in its dispute with Piggyback by appealing to the neutrals' employees to respect its picket line and, *in the case of Santa Fe's employees*, by *further* appealing to them to refuse to do that part of their daily work which involved Santa Fe's intermodal freight operations, *if they chose to disregard* [*petitioner's*] *picket line and go to work.*"[9] Pet. App. B80-B81 (emphasis added). That finding was not disturbed by the court of appeals, and it does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). Under the ALJ's finding, it is clear that one of the goals of petitioner's conduct was to persuade *all* of Santa Fe's employees, and those of other neutral employers doing business with Santa Fe, to refuse to cross its picket lines.[10]

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[9] Petitioner's statement (Pet. 13-14) that the Board "did not quarrel" with its contention that it had confined its appeals to neutral employees who performed work "directly related to and necessary for Piggyback's operations" is incorrect.

[10] The ALJ's finding is amply supported by the record. For example, the signs carried by petitioner's pickets at all gates stated that Piggyback was "unfair" to petitioner (Pet. App. B25), thereby making a general appeal to the neutral employees not to cross the picket line at all. The handbills distributed to the truckdrivers of Santa Fe's customers entering Gate 3 to pick up or drop a trailer similarly requested them "to respect our picket line" against Piggyback (*id.* at B25-B26); the union-represented drivers, including those employed by UPS, Santa Fe's largest customer for intermodal freight, responded by refusing to cross the picket line. *Id.* at B28. In addition, before petitioner extended its picketing and handbilling to Gate 5 (the entrance to the rail yard at Indian Crossing), it wrote to the unions representing Santa Fe's employees requesting them to inform those employees that they

Such a refusal to cross the picket lines would naturally disrupt Santa Fe's entire operation at the terminal, including its movement of nonintermodal freight, as to which Piggyback played no role whatever. Even under petitioner's own theory, petitioner was not privileged to appeal to the neutral employer's employees to refrain from work that was wholly unrelated to Piggyback's operation. Petitioner's picketing was unlawful on that basis alone, because a single unlawful secondary object brings a union's activity within the prohibition of Section 8(b)(4)(B), even if the activity has other, lawful objects. *International Longshoremen's Ass'n* v. *Allied Int'l, Inc.*, 456 U.S. 212, 224 & n.21 (1982); *Denver Building & Construction Trades Council*, 341 U.S. at 689.

2. Petitioner also contends (Pet. 23) that, quite apart from its claim that *General Electric* applies to the facts of this case, the Board lacks a reasonable basis for distinguishing between picketing directed at the suppliers of a primary employer at a common situs, on the one hand, and petitioner's picketing of Santa Fe and its customers, whose employees "perform work on the situs necessary to the normal operations of the primary employer," on the other. There is no merit to that contention. A "supplier" provides material for the exclusive use of the primary employer; accordingly, the disruption caused by picketing of a supplier is confined to the primary employer itself. Pet. App. A32-A33, B99; *J.F. Hoff Electric Co.* v. *NLRB*, 642 F.2d 1266, 1275 (D.C. Cir. 1980), cert. denied, 451 U.S. 918 (1981). In contrast, the intermodal freight "supplied" to Piggyback's employees by Santa Fe and its customers' employees was

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could honor petitioner's picket line without jeopardizing their jobs. *Id.* at B34-B36.

not provided for Piggyback's exclusive use; it was provided to Piggyback as a step in the transportation of the freight by Santa Fe to its final destination.[11] Pet. App. B99. Accordingly, the disruption caused by picketing directed at Santa Fe and its customers was not confined to the primary employer (Piggyback), but was intended to interfere with the business of neutral employers. Indeed, the picketing ultimately disrupted not only Piggyback's operation but the functioning of the entire terminal. Thus, as the facts of this case illustrate, the Board reasonably distinguishes between picketing of the type conducted by petitioner and picketing of a supplier to the primary employer.

[11] As the ALJ noted, "the common sense notion of supplies for Piggyback's operation would be cranes, tractors, oil and gas, office supplies, maintenance services and labor, and not the intermodal freight delivered to Piggyback's employees, inasmuch as that freight was not delivered to Piggyback for its employees to 'use' in the performance of their duties, but was delivered so that it would be transported by employees of employers, other than Piggyback, to its ultimate destination." Pet. App. B99.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1994